

July 2015

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Recommended Citation

Bassiouni, M. Cherif (1984) "Extradition Reform Legislation in the United States: 1981-1983," *Akron Law Review*: Vol. 17 : Iss. 4, Article 1.

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Bassiouni: Extradition

EXTRADITION REFORM LEGISLATION IN THE UNITED STATES: 1981-1983

by

M. CHERIF BASSIOUNI*

I. INTRODUCTION

ON SEPTEMBER 18, 1981 a draft extradition act entitled "The Extradition Act of 1981" was introduced before the United States Senate.¹ On December 15, 1981, another draft extradition act entitled "The Extradition Reform Act of 1981" was introduced before the United States House of Representatives.² Hearings were held in both the Senate³ and House⁴ on these bills, leading to their amendment and subsequent reintroduction.⁵ The "1981 Extradition Act" was passed by the Senate⁶ while the "1981 Extradition Reform Act" was not passed by the House. Since no House bill was passed, new legislation had to be introduced in the next session of Congress. On January 26, 1983 a new Senate Bill was introduced.⁷ On April 20, 1983, a new House bill was intro-

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The author gratefully acknowledges the assistance of Susan E. Morehouse, J.D., DePaul University College of Law, 1984, Clerk, Illinois Appellate Court, who assisted in this research under a grant from the Illinois Bar Foundation during her senior year in law school.

¹See S. 1639, 97th Cong., 1st Sess. (1981), 127 CONG. REC. S10032 (daily ed. Sept. 18, 1981) [hereinafter referred to as S. 1639]. The provisions in the bill were originally introduced as part of proposed legislation to amend the federal criminal code. See S. 1630, 97th Cong., 1st Sess., 127 CONG. REC. S9916 (daily ed. Sept. 17, 1981).

²See H.R. 5227, 97th Cong., 2d Sess., 128 CONG. REC. H9670 (daily ed. Dec. 15, 1981) [hereinafter referred to as H.R. 5227].

³See *The Extradition Act of 1981: Hearings on S. 1639 Before the Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter referred to as *Senate Judiciary Hearings on S. 1639*].

⁴See *The Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter referred to as *House Judiciary Hearings on H.R. 5227*].

⁵S. 1639 was amended and reintroduced as S. 1940. See S. 1940, 97th Cong., 2d Sess., 127 CONG. REC. S15101 (daily ed. Dec. 11, 1981) [hereinafter referred to as S. 1940]. H.R. 5227 was amended and reintroduced as H.R. 6046 and was entitled "The Extradition Reform Act of 1982." See H.R. 6046, 97th Cong., 2d Sess., 128 CONG. REC. H1405 (daily ed. April 1, 1982) [hereinafter referred to as H.R. 6046].

⁶See 128 CONG. REC. S10880 (daily ed. Aug. 19, 1982).

⁷See S. 220, 98th Cong., 1st Sess., 129 CONG. REC. S385 (daily ed. Jan. 27, 1983) [hereinafter referred to as S. 220] entitled the "Extradition Act of 1983." Comparable extradition legislation was also introduced as Part M of Title X of the Comprehensive Crime Control Act of 1983, see S. 829, 98th Cong., 1st Sess. (1983), 129 CONG. REC. S 3070 (daily ed. March 16, 1983), which was amended and subsequently reintroduced as S. 1762. See S. 1762, 98th Cong., 1st Sess. (1983), 129 CONG. REC. S11713 (daily ed. August 4, 1983). This subsequent version was favorably reported by the Senate Judiciary Committee on September 14, 1983, see S. Rep. No. 225, 98th Cong., 1st Sess. (1983), and favorably reported by the Senate Foreign Relations Committee on September 20, 1983, see S. Rep. No. 241, 98th Cong., 1st Sess. (1983). The Senate has separated out the provisions regarding extradition from the Comprehensive Crime Control Act bill, however, and intends to consider it separately. There is no expectation that the House will accept the Senate version in view of the fact that it resembles S. 1639 and S. 1940 which the House substantially revised.

duced.⁸ The legislative process is still underway, but observers do not believe that a bill will be passed soon.

This article will analyze the draft legislative texts intended to amend 18 U.S.C. §§ 3181-3195. They are referred to herein as the "Act" when the provisions of the drafts are substantially the same, and are referred to as the "Senate and House bills" when their provisions differ. Any variances between the different Senate and House versions are noted in the footnotes. The Senate version in the text refers to S. 1639 of 1981, S. 1940 of 1982 and S. 220 of 1983 with differences among them noted in the footnotes. The House version in the text refers to H.R. 5227 of 1981, H.R. 6046 of 1982 and H.R. 2643, with variances between the two included in the footnotes, as well as references to committee deliberations.

⁸See H.R. 2643, 98th Cong., 2d Sess. 129 CONG. REC. H2249 (daily ed. April 20, 1983) [hereinafter referred to as H.R. 2643]. The Administration's views were conveyed to the Senate and the House by Michael Abbell, then Director, International Affairs Division, Department of Justice, and John Harris of that Division who prepared the Administration's drafts, and Daniel McGovern, then Deputy Legal Adviser, Department of State. S. 1639 and S. 1940 were introduced by Senator Strom Thurmond, Chairman of the Committee on the Judiciary; the principal resource person on those bills was Paul Summit, Chief Counsel of the Judiciary Committee. H.R. 2643, H.R. 5227 and H.R. 6046 were introduced by Congressman William Hughes, Chairman, Sub-Committee on Crime of the Committee on the Judiciary. The principal resource person on these bills was David Beier, Counsel, Committee on the Judiciary. S. 220, which was almost identical to S. 1940, was introduced by Senator Paul Laxalt, Chairman of the newly-created Sub-Committee on Crime Legislation to the Committee on the Judiciary.

The American Society of International Law contributed to the legislative drafting process in 1982 by convening a meeting of the principal resource persons of the Senate and House Committees on the Judiciary, the Senate Committee on Foreign Relations, representatives of the Departments of Justice and State, and a number of experts to discuss the various contending views. The views of the Administration were more specifically embodied in the Senate bills. Other views, including many suggestions presented by this writer, found their expression in the House bills. It was the expectation of all concerned that if H.R. 6046 would pass the House, a conference on S. 1940 and H.R. 6046 would produce a new Act in 1982. But since the House bill was not passed in 1982, new Senate and House bills had to be introduced in 1983. This occurred in the Senate with S. 220, and in the House with H.R. 2643 and H.R. 3347. There would eventually be a conference to reconcile differences between the two versions before a new Act could be enacted into law entitled the "Extradition Act of 1983." Comparable extradition legislation was also introduced as part of the Comprehensive Crime Control Act of 1983, see H.R. 2013, 98th Cong., 1st Sess. (1983), 129 CONG. REC. H1110 (daily ed. March 9, 1983), which was amended and subsequently reintroduced as H.R. 2151. See H.R. 2151, 98th Cong., 1st Sess. (1983), 129 CONG. REC. H1265 (daily ed. March 16, 1983). H.R. 2643 was the subject of hearings before the Subcommittee on Crime to the Committee on the Judiciary on April 28, 1983 and May 5, 1983. The Subcommittee is currently contemplating publication of these hearings. The bill was marked up by the Subcommittee and a clean bill ordered favorably reported to the full Committee on June 8, 1983. It was then reintroduced as H.R. 3347, also entitled the "Extradition Act of 1983," on June 16, 1983, see 129 CONG. REC. H 4102 (daily ed. June 16, 1983), and forwarded to the full Committee. The Judiciary Committee further amended the bill and ordered it favorably reported to the House on October 4, 1983. See Staff of House Committee on the Judiciary, 98th Cong., 1st Sess., Extradition Bill (Comm. Print Oct. 6, 1983). H.R. 3347 as marked up was technically never reported out to the House, however, since it had to be accompanied by a report and none was ever filed. This Article will therefore refer to the latest version of H.R. 3347 in the notes where appropriate. It is expected that the report will not be filed and the bill not reported out to the full House, because of opposition to it from the Department of Justice as well as dissatisfaction with some of its provisions within the Committee, particularly the provisions dealing with the rule of non-inquiry and conspiracy. As to the Department of Justice, it prefers to operate under existing legislation rather than under the new draft, essentially because of the bill's provisions regarding bail but also, as this writer sees it, because the new legislation provides far less opportunity for ambiguity, which is frequently utilized to the Government's advantage, than does existing legislation and its interpretation.

II. LEGISLATIVE HISTORY

The existing legislation on extradition which is found in 18 U.S.C. §§ 3181-3195⁹ dates back to 1848.¹⁰ In the subsequent 135 years (until 1983) the original 1848 Act has been amended in a piecemeal fashion ten times.¹¹ Thus there is a need to update this important legislation on which so much of the international penal cooperation of the United States depends.¹²

As indicated above, since 1981 a number of bills regarding extradition have been introduced before the Senate and House. In addition, the Administration, although backing the Senate versions, included similar draft legislation in other criminal law bills before the Senate.¹³ The first version of the Extradition Reform Act was introduced in the United States Senate on September 18, 1981 as S. 1639¹⁴ ostensibly in order "to modernize the statutory provisions relating to international extradition,"¹⁵ although it did not achieve these far-reaching objectives. The bill was entitled "The Extradition Act of 1981."¹⁶

⁹18 U.S.C. §§ 3181-3195 (1976).

¹⁰Act of August 12, 1848, ch. 167, § 5, 9 Stat. 302, 303 (established authority and procedures for judicial review of extradition requests).

¹¹Act of June 22, 1860, ch. 184, 12 Stat. 84 (required authentication of documents); Act of March 3, 1869, ch. 141, §§ 1-3, 15 Stat. 337 (established procedure for delivery of relator from U.S. to requesting state); Act of June 19, 1876, ch. 133, 19 Stat. 59 (provided that authenticated foreign documents are admissible into evidence); Act of August 3, 1882, ch. 378, §§ 1-6, 22 Stat. 215 (established fees and costs for extradition); Act of June 6, 1900, ch. 793, 31 Stat. 656 (specified extraditable offenses and established political offense exception); Act of June 28, 1902, ch. 1301 (judicial), 32 Stat. 419, 475 (provided for collection of costs from requesting state); Act of March 22, 1934, ch. 73, §§ 1-4, 48 Stat. 454 (established procedure for extradition to and from countries or territories controlled by the U.S.); Act of June 25, 1948, ch. 645, 62 Stat. 822 (codified existing practice not previously set forth in statute); Act of May 24, 1949, ch. 139, 63 Stat. 96 (amended list of extraditable offenses); Act of October 17, 1968, 82 Stat. 1115, Pub. L. No. 90-578, tit. III, § 301(a)(3) (substituted "magistrate" for "commissioner" in extradition statutes).

¹²International penal cooperation includes the processes of extradition, judicial assistance, and transfer of offenders. See generally 2 M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW (1973); M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter referred to as M.C. BASSIOUNI, INTERNATIONAL CRIMINAL CODE]. For a review of these procedures under U.S. law and practice, see generally M.C. BASSIOUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE (2 vols. 1983) [hereinafter referred to as M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION]. Extradition is a "system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought after as an accused criminal or a fugitive offender." 1 *Id.*, at ch. I, § 1, p. 1. The practice originated in early non-Western civilizations, and has now reached the point where it is a common feature of bilateral, regional, and multilateral arrangements between states. See 1 *id.*, at ch. I, § 1, p. 2, and ch. I, § 6. See also BASSIOUNI, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. (1983) 27. The concept of the duty to prosecute or extradite originated in the writings of Hugo Grotius, who propounded the maxim *aut dedere aut punire*, which is more appropriately phrased as *aut dedere aut judicare*. See H. GROTIUS, DE JURE BELLI AC PACIS, Book 2, ch. 21, §§ 3, 4 (1624). See also 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* at ch. I, § 2. See generally MURPHY, *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477 (1982).

¹³S. 1639, the first Senate bill introduced in the 97th Congress on U.S. extradition, was also introduced as part of S. 1630 to amend the federal criminal code. See *supra* note 1. S. 220, the first Senate bill introduced in the 98th Congress, was also introduced as part of S. 829 to amend the federal criminal code. See *supra* note 8.

¹⁴See *supra* note 1.

¹⁵S. REP. NO. 331, 97th Cong., 2d Sess. 3 (1982) [hereinafter referred to as Senate Judiciary Report on S. 1940]. The Senate Judiciary Committee did not issue a report on S. 1639, but did issue one on the amended version of S. 1639 which was numbered S. 1940.

¹⁶See *id.* at 3 n.1.

After hearings before the Senate,¹⁷ the original version was amended and a "clean bill" introduced in the Senate on December 11, 1981 as S. 1940.¹⁸ This clean bill version was favorably reported by the Committee on the Judiciary with Committee amendments on April 15, 1982,¹⁹ and sequentially referred to the Senate Committee on Foreign Relations on April 19, 1982.²⁰ Other than the "political offense exception," the Committee considered in a very cursory way other questions within its competence, and favorably reported the bill, with Committee amendments, on June 17, 1982.²¹

During this period, the House of Representatives was considering its own version of a new act to revise United States extradition law and procedure. H.R. 5227, the original House bill, was introduced on December 15, 1981, before the Subcommittee on Crime of the Committee on the Judiciary.²² It was entitled "The Extradition Reform Act of 1981."²³ The bill "incorporated many of the suggestions of the Administration which [would be] . . . found in Senate bill S. 1940."²⁴ But in response to suggestions made at hearings on the bill and through written statements,²⁵ the House Subcommittee on Crime made significant improvements in the bill and approved an amendment in the nature of a substitution to replace H.R. 5227. The resulting "clean bill" H.R. 6046, entitled "The Extradition Reform Act of 1982," was favorably reported by the Committee on the Judiciary on June 24, 1982, with amendments;²⁶ on that date, it was sequentially referred to the Committee on Foreign Affairs.²⁷ That Committee, however, declined to entertain any amendments to provisions dealing with matters within its jurisdiction and favorably reported the bill without amendment on July 29, 1982.²⁸ The Committee's Report expressly noted, however, that it favorably reported the bill without amendment "with the understanding that the members of the committee would be able to offer their amendments to the bill when it [would be] considered by the Committee of the Whole House."²⁹ Committee members' views were published as "Addi-

¹⁷See *Senate Judiciary Hearings on S. 1639*, *supra* note 3.

¹⁸See S. 1940, *supra* note 5.

¹⁹Senate Judiciary Report on S. 1940, *supra* note 15.

²⁰See S. REP. NO. 475, 97th Cong., 2d Sess. 2 (1982) [hereinafter referred to as Senate Foreign Relations Report on S. 1940]. The Senate Foreign Relations Committee did not hold formal hearings on the bill.

²¹*Id.* See also *infra* notes 31-32 and accompanying text.

²²See *supra* note 2.

²³See H.R. REP. NO. 627, Part I, 97th Cong., 2d Sess. 1 (1982) [hereinafter referred to as House Judiciary Report on H.R. 6046]. The House Judiciary Committee did not issue a report on H.R. 5227, but did so on an amended version of H.R. 5277, which was numbered H.R. 6046.

²⁴*Id.* at 3.

²⁵See *House Judiciary Hearings on H.R. 5227*, *supra* note 4.

²⁶See House Judiciary Report on H.R. 6046, *supra* note 22.

²⁷H.R. REP. NO. 627, Part II, 97th Cong., 2d Sess. (1982) [hereinafter referred to as House Foreign Affairs Report on H.R. 6046]. See *The Extradition Reform Act of 1982: Hearings on H.R. 6046 Before the Comm. on Foreign Affairs*, 97th Cong., 2d Sess. (1982) (publication pending) [hereinafter referred to as *House Foreign Affairs Hearings on H.R. 6046*].

²⁸See House Foreign Affairs Report on H.R. 6046, *supra* note 27.

²⁹*Id.* at 2.

tional Views" in the Committee's Report.³⁰

On August 19, 1982, the Senate, in accordance with Congressional rules, published its enacted version of the Extradition Act of 1981 in the Congressional Record.³¹ By error, the enacted bill published in the Record contained, without distinction, both the amendments adopted by the Senate Judiciary Committee and those adopted by the Senate Foreign Affairs Committee, which were contradictory on several important points, including the definition of the "political offense exception" and the court's jurisdiction to determine the applicability of the exception.³² However, this was later corrected by an insertion in the Record to reflect that the Senate had enacted the bill as approved by the Foreign Relations Committee. This minor technical error was symptomatic of the limited and hurried attention given by these two Senate Committees to this important legislation.

Subsequently, the House was to have enacted its own version of the bill in September 1982 or in the "lame duck" session of November 1982, but it did not. On January 26, 1983, during the first session of the 98th Congress, a Senate bill was introduced before the newly established Senate Sub-Committee on Crime Legislation of the Committee on the Judiciary as S. 220, "The Extradition Act of 1983,"³³ which is almost identical to S. 1940 adopted by the Senate

³⁰*Id.* at 6 (remarks of Hon. Geo. W. Crockett, Jr.); *id.* at 7 (remarks of Hon. Paul Findley); *id.* at 8 (remarks of Hon. Arlen Erdahl). Subsequent to the House Foreign Affairs Committee's favorable reporting of H.R. 6046, several Members of Congress voiced strong objections to the bill on the floor of the House. Congressman Crockett proposed provisions to (a) amend the definition of a "political offense"; (b) give the judiciary the authority to deny extradition if it finds that the person if returned would be persecuted because of his "race, religion, nationality, membership in a particular group, or political opinion"; (c) impose upon the Secretary of State the duty to condition extradition upon compliance with international law, including international protection of human rights; (d) provide explicitly for the relator's right to petition the Secretary of State to refuse or condition his extradition; (e) provide explicitly for the "rule of specialty," which requires that the requesting state shall prosecute an individual only for those crimes for which extradition was granted; (f) require that a requesting state shall be represented only by private counsel at extradition proceedings in the United States. See 128 CONG. REC. H6968-70 (September 14, 1982). Other members of Congress, while not proposing specific amendments, voiced disagreement over substantially the same provisions with which Congressman Crockett took issue, most notably the narrowly defined political offense exception and the perceived need to have the judiciary determine whether the relator, if returned, would be subjected to persecution because of religious, racial, or political beliefs. See 128 CONG. REC. E4128 (daily ed. Sept. 13, 1982) (remarks of Hon. D. Edwards); *id.* at E4145, E4152 (daily ed. Sept. 14, 1982) (remarks of Hon. F. Stork; Hon. J. Conyers, Jr.); *id.* at E4179, E4189, E4192, E4200, E4201 (daily ed. Sept. 15, 1982) (remarks of Hon. A. Moffett, Hon. G. Studds, Hon. W. Fauntroy, Hon. P. Schroeder, Hon. S. Chisholm); *id.* at E4214, E4222, E4233, E4241, E4245 (daily ed. Sept. 16, 1982) (remarks of Hon. R. Wyden, Hon. B. Frank, Hon. W. Brodhead, Hon. D. Bonioz, Hon. B. Rosenthal). Congressman Hughes, sponsor of H.R. 6046 and Chairman of the Subcommittee on Crime in the House Judiciary Committee, responded to Congressman Crockett's proposed amendments in a letter to Congressman Crockett dated September 22, 1982. In that letter, Congressman Hughes defended the bill's definition of the political offense exception and failure to include political persecution in the court's determination of extraditability. He took no issue with the proposals regarding conditional extradition to ensure the protection of the relator's human rights, petition to the Secretary of State, and the rule of specialty, because he considered these proposals to be merely codifications of existing practice. He did object to the requesting state's use of private counsel.

³¹128 CONG. REC. S10880-84 (daily ed. Aug. 19, 1982).

³²*Id.* at S10882-83.

³³S. 220, *supra* note 7. The bill was introduced both as a separate, independent bill and as part of a bill to amend the federal criminal code. See *supra* note 8.

on August 12, 1982. On April 20, 1983, during the second session of the 98th Congress, a new House bill was introduced before the Sub-committee on Crime of the Judiciary Committee as H.R. 2643, "The Extradition Act of 1983,"³⁴ which is very similar both to its predecessor in the House, H.R. 6046, and to the new Senate bill, S. 220. The marked-up copy of H.R. 2643 was reintroduced as H.R. 3347, but was not technically reported out, even after being marked-up.^{34a}

III. HISTORICAL NOTE

It is particularly interesting to note the historical similarity between the 1848 Act,³⁵ whose structure remains in effect to date subject to the amendments referred to above,³⁶ and the Act which is intended to replace it. The two reforms were prompted essentially by considerations arising out of the political aspects of extradition rather than its technical aspects. The 1848 Act can be traced to the landmark case of *In re Robbins*,³⁷ decided in 1799. In that case, President Adams granted England's request that the United States extradite an individual charged in England for a murder he had allegedly committed while in the British navy. Robbins' defense was that he had been impressed into British service; he had escaped during the other crew members' mutiny in which the ship's officers had been killed. Many individuals in the United States perceived this to be a justifiable act for which punishment was wholly inappropriate, such that Robbins should not have been returned to England.³⁸ Although the exact term "political offense exception" was not used at the time, the underlying concept was already recognized.³⁹

The legal basis for Robbins' surrender was President Adams' order that he be arrested and returned to England. In reviewing that order the federal district court sitting in Charleston, South Carolina in habeas corpus proceedings relied on the President's directions through the Secretary of State, even though neither Jay's Treaty with England⁴⁰ (which was the treaty basis for the request) nor national legislation formed a legal basis for such action.⁴¹ President Adams' decision in the highly publicized extradition of Robbins was considered one

³⁴H.R. 2643, *supra* note 8.

^{34a}See *supra* note 8.

³⁵Act of August 12, 1848, ch. 167, § 5, 9 Stat. 302, 303.

³⁶See *supra* note 11.

³⁷27 F. Cas. 825 (No. 16,175) (D.S.C. 1799).

³⁸See 10 ANNALS OF CONGRESS 580-640 (1800), *reprinted following* U.S. v. Robbins, 27 F. Cas. 825, 833-70 (No. 16,175) (D.S.C. 1799).

³⁹For an historical analysis of the "political offense exception," see 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 2; C. VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION (1980).

⁴⁰The Treaty of Amity, Commerce and Navigation with Great Britain (Jay Treaty), 19 November 1794, 8 Stat. 116, T.S. No. 105, *reprinted in* 1 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 490 (1910).

⁴¹See *In re Robbins*, 27 F. Cas. 825, 827 (No. 16,175) (D.S.C. 1799).

of the reasons for his failure to be re-elected as President.⁴²

The political controversy and legal irregularities of *Robbins* were not soon forgotten. In 1848, similar factors were brought to the forefront of public attention once more in the *Metzger* case,⁴³ which prompted Congress to enact the 1848 Extradition Act.⁴⁴

The 1981-82-83 Acts have been prompted primarily by three highly publicized *causes célèbres* in which the "political offense exception" was at issue: *Matter of Mackin*,⁴⁵ *In re McMullen*,⁴⁶ and *Eain v. Wilkes*.⁴⁷ In *McMullen* and *Mackin* extradition to England was denied on the basis of the political offense exception; in the *Eain* case, however, the exception was denied and the relator extradited to Israel.

The Department of Justice, through some of its officials, made an inordinate issue of these cases before the Senate and the House. Regrettably, the motivations for the revisions of the United States extradition statute were presented to Congress on the erroneous assumption that the "political offense exception" has been interpreted or perceived to be a bar to effective extradition. This position was asserted by Administration representatives at hearings on the bills before both the Senate and the House,⁴⁸ wherein there was even the preposterous and alarming warning that a continuation of such a trend would cause the United States to become a haven for terrorists.⁴⁹ This result

⁴¹ J. B. MOORE, A TREATISE ON EXTRADITION AND INTER-STATE RENDITION 550-51 (1891).

⁴² *In re Metzger*, 17 F. Cas. 232 (No. 9,511) (S.D.N.Y. 1847). In *Metzger*, France requested that the U.S. extradite an individual charged with forgery in France. The judicial determination of *Metzger's* extraditability was made by Judge Betts in chambers, who found his extradition in order. The decision prompted considerable discussion over whether judicial review could be performed in chambers as opposed to in open court.

⁴³ Ch. 167, § 5, 9 Stat. 302, 303. See *In re Kaine*, 55 U.S. (14 How.) 63 (1852), in which the Court expressly noted "[t]hat the eventful history of *Robbins's* case had a controlling influence . . . especially on Congress, when it passed the act of 1848, is, as I suppose, free from doubt." *Id.* at 68.

⁴⁴ No. 80 Cr. Misc. 1 (S.D.N.Y., Aug. 13, 1981), *aff'd*, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981). In *Mackin*, the United Kingdom's request that a member of the Provisional Irish Republic Army be extradited to the U.K. in order to face prosecution for the charge of attempted murder and related offenses he allegedly committed against a British soldier (dressed in civilian clothes) standing in a Belfast bus station was denied on the grounds that these charges were "political offenses" for which extradition could not be granted.

⁴⁵ No. 3-78-1899 M.G. (N.D. Cal., May 11, 1979). In *McMullen*, the United Kingdom's request that a member of the Provisional Irish Republic Army be extradited to the U.K. in order to face prosecution for his alleged bombing of a British army installation in England was denied on the grounds that he was being sought for a "political offense" for which extradition could not be granted.

⁴⁶ 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). In *Abu Eain*, Israel's request that an alleged member of the Palestine Liberation Organization be extradited to Israel to be prosecuted for his alleged bombing of a bus in Israel was granted; the court refused to entertain the relator's defense that such charges constituted "political offenses."

⁴⁷ See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 2, 4, 8, 14 (testimony of M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 26-27, 32 (testimony of R. Olsen, M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 26.

⁴⁸ See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 30 (testimony of W. Hannay). The Senate Judiciary Committee, which supported the view that the political offense exception should be placed outside the court's jurisdiction, placed special emphasis on this testimony and written statement as "an excellent

is hardly likely since the "political offense exception" has so rarely been argued, let alone successfully, in the United States as a basis for denial of an extradition request. In fact, it has been successful in only two cases in the last twenty years.⁵⁰ In addition, the "exception" is rarely used as a defense — in the last thirty years, there have been only some thirty reported cases having any bearing on the "political offense exception." During this same period of time, however, there have been between fifty and one hundred extradition requests per year raising a panoply of technical questions much more important to the administration of criminal justice and international cooperation in criminal matters than the rare "political offense exception."⁵¹ These technical questions⁵² have received little consideration in the Senate, and somewhat greater attention in the House.

The fundamental controversy giving rise to both the 1848 Act and the 1981-82-83 Acts is the respective roles of the executive, legislative and judicial branches in granting a foreign state's extradition request. The outcomes, however, were different on these two historic occasions. The 1848 Act was designed to limit executive power such that President Adams' action in *Robbins* of ordering an individual's surrender would be impermissible. The underlying theory was that the judiciary should have the authority to review executive action such that fundamental individual liberty would not be improperly infringed. The 1981-82-83 Acts in the original Senate versions intended the opposite. The Administration has sought to expand the executive's authority to extradite individuals on the theory that judicial review should not be allowed to interfere with the executive's authority to direct the United States' foreign relations, and to use extradition as a method of fostering friendly relations with foreign states.⁵³ This philosophic diversity is the essence of the differences between the Senate bills and the House bills, with the Administration's view reflected in the Senate's more executive oriented approach.

The Act does not fulfill all of the Administration's requests, although it does curb judicial discretion and review and the increasing safeguards of individual rights which have been more manifest in the last two decades of United States jurisprudence.⁵⁴ The Act represents a technical improvement over existing

discussion of the political offense exception to extradition and the impact of recent cases," which the Committee adopted as its view. See Senate Judiciary Report on S. 1940, *supra* note 15, at 14 nn. 59, 60, 15 n.61.

⁵⁰*In re Mackin*, No. 80 Cr. Misc. 1 (S.D.N.Y., Aug. 13, 1981), *aff'd*, United States v. Mackin, 668 F.2d 122 (2d Cir. 1981); *In re McMullen*, No. 3-78-1899 M.G. (N.D. Cal., May 11, 1979).

⁵¹See generally, 2 M.C. BASSIOUNI & V.P. NANDA, *supra* note 12 for a review and analysis of the various forms of international cooperation in penal matters.

⁵²Examples of such aspects are provisions regarding transit extradition, priority of extradition requests, and the rule of specialty. See Senate Judiciary Hearings on S. 1639, *supra*, note 3, at 20-24 (testimony of M. Cherif Bassiouni); House Judiciary Hearings on H.R. 5227, *supra* note 4, at 98-106 (testimony of M. Cherif Bassiouni).

⁵³This argument was raised unsuccessfully by the U.S. government in *Eain v. Wilkes*, 641 F.2d 504 (7th Cir., 1981), *cert. denied*, 454 U.S. 894 (1981).

⁵⁴See, e.g., M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12; M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER (1974) for a review and analysis of this developing trend in U.S. jurisprudence.

legislation and is indeed needed to meet the contemporary exigencies of an expected volume of some one hundred requests per year in the 1980's, and also in order to settle some questions with which the judiciary had been wrestling for years due to the lack of clear legislative mandate. Yet it leaves many open questions which it shifts to the judiciary for future interpretation. In many respects the Act does no more than codify existing jurisprudence.⁵⁵ More should have been done, and an opportunity which waited 135 years was not fully utilized.

IV. STRUCTURE OF THE ACT

Both the Senate and House versions are similarly structured in terms of the general format of sections regarding: (1) general requirements; (2) the complaint stage; (3) the waiver stage; (4) the hearing stage; (5) the appeal stage; (6) the surrender stage; (7) the receipt stage; (8) definitions and general provisions. This general format was established in the 1981 Extradition Act embodied in the Senate bills and was followed by the House Judiciary Committee in its bills.

The specific structures of the Senate and House versions, respectively, are as follows:

1. Senate Versions:

CHAPTER 210 - INTERNATIONAL EXTRADITION

Sec.

- 3191. Extradition authority in general.
- 3192. Initial procedure.
- 3193. Waiver of extradition hearing and consent to removal.
- 3194. Extradition hearing.
- 3195. Appeal.
- 3196. Surrender of a person to a foreign state.
- 3197. Receipt of a person from a foreign state.
- 3198. General provisions for chapter.⁵⁶

2. House Versions:

CHAPTER 210 — INTERNATIONAL EXTRADITION

Sec.

- 3191. General statement of requirements for extradition.
- 3192. Complaint and preliminary proceedings.
- 3193. Waiver of hearing.
- 3194. Hearing and order.
- 3195. Appeal from determination after hearing.
- 3196. Surrender of a person to a foreign state after hearing.

⁵⁵See generally M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12.

⁵⁶S. 220, *supra* note 7, §§ 3191-3198; S. 1940, *supra* note 5, §§ 3191-3198; S. 1639, *supra* note 1, §§ 3191-3198.

- 3197. Cooperation with transit through United States for foreign extradition.
- 3198. Receipt of a person from a foreign state.
- 3199. Definitions and general provisions for chapter.⁵⁷

The provisions of the Act are divided and subdivided, ostensibly according to the various stages of the extradition process. In fact, however, there is a great deal of commingling of substantive and procedural aspects in the same provisions. There are also other confusing aspects in the organization of the subject. For example, the substantive requirements for extradition are scattered throughout the Act. A particular anachronism appears in section 3199 of the House version; although its title indicates that it pertains to definitions and general provisions, it also contains a detailed subsection regarding bail⁵⁸ which properly belongs in a separate section or at least in section 3192 entitled "Complaint and Preliminary Proceedings." The confusion of procedural and substantive matters in the Act results in a lack of clarity and organization which could have been avoided easily had the Act been structured differently. But the reason is due essentially to a divergence in perspective. The Senate versions favored by the Administration were intended to be procedural, leaving all substantive questions to treaties which the Administration can negotiate with much more leeway. The House versions on the other hand sought to limit this approach and provide more uniformity in the substantive aspects of the practice.

V. RELATIONSHIP BETWEEN THE LEGISLATION AND TREATIES

The relationship between legislative provisions and treaty provisions is of fundamental importance in United States extradition law and practice because of the Constitution and the relationship between treaties and legislation.⁵⁹ Basically, this relationship can take one of two forms: (1) the legislation can serve as the basis for all or most substantive and procedural matters while treaties include exceptional matters not included in the legislation; or (2) the legislation can serve as a supplement to treaties such that all substantive and procedural matters are regulated primarily by treaties rather than by the legislation. The Act is a hybrid of both.

The distinction between these two possible relationships has important ramifications. If the former approach were followed, then national legislation would be controlling with respect to all extradition matters and would regulate its substance and procedure. Treaties would be the exception; that is, they would regulate matters not included in the legislation or negotiated in the treaty as

⁵⁷H.R. 3347, *supra* note 8, §§ 3191-3199; H.R. 2643, *supra* note 8, §§ 3191-3199; H.R. 6046, *supra* note 5, §§ 3191-3199; H.R. 5227, *supra* note 2, §§ 3191-3198. H.R. 5227 contained no provision regarding transit extradition, which was inserted in subsequent versions of the House legislation as § 3197.

⁵⁸H.R. 2643, *supra* note 8, § 3199(c); H.R. 6046, *supra* note 5, § 3199(c); H.R. 5227, *supra* note 2, § 3199(c). H.R. 3347, *supra* note 8, includes bail provision in § 3192 regarding the complaint and preliminary proceedings. See *infra* notes 169-85 and accompanying text.

⁵⁹See generally L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972).

an exception to the legislation. If the latter approach were followed, however, then national legislation would not be the general rule. Instead, every treaty would become a separate substantive and procedural statute more or less different from the legislation. The result of that approach would be to have as many sets of norms applied by the courts as there are treaties, and there are at present ninety-six treaties in force applicable to 113 countries.⁶⁰ The obvious consequence would be a lack of consistency and uniformity in the practice of extradition and potential jurisprudential confusion leading to increased litigation and prolongation of the process. Precedents would therefore usually affect the interpretation of the provisions of each treaty, thus stimulating increased judicial recourses and delays through the review process. In addition to the obvious advantages of uniformity, reduction of litigation, and shortening of delays in the process, a truly national legislation would also reduce the burden on the United States government in renegotiating with every foreign government basic substantive and procedural matters already contained in the national legislation. Furthermore, the existence of national legislation, while it would not preclude the government from negotiating treaty provisions that might be contrary to it, would nevertheless strengthen the government's position in its negotiations with foreign governments regarding provisions urged by the foreign government that would differ from national legislation. It would thus maintain greater uniformity among treaties and conformity between treaties and the legislation. The more the legislation in its specific language allows for treaties to regulate certain substantive and procedural matters, the more likely it is that foreign governments will insist on particular clauses which may differ from the legislation. Furthermore, national legislation that is comprehensive, covering substance and procedure, would allow extradition to be performed on the basis of "executive agreement" and "reciprocity,"⁶¹ which the Act excludes, presumably in reliance on longstanding and established jurisprudence,⁶² although nothing in the Constitution would prevent it.⁶³

Regrettably, the general orientation of the Act is that it is a supplement to treaties or that it otherwise applies in the absence of contrary treaty provisions, but only when a treaty does exist between the requesting state and the United States. Consequently, all substantive and procedural matters which can of course be regulated by treaties will tend to be precisely that. This approach

⁶⁰See 18 U.S.C.A. § 3181 (1984 Supp.). See also I. Kauass & A. Sprudes, *Extradition Laws and Treaties; United States* (2 vols. 1979 and 1982 update).

⁶¹See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. II § 3, pp. 6-9.

⁶²See, e.g., *United States v. Rauscher*, 119 U.S. 407 (1886), in which the Court stated: It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties . . . Prior to these treaties, and apart from them . . . there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity . . . [It] has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Id. at 411.

⁶³See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. II, § 1, p. 3.

differs from that of many countries which attempt to conform their treaties to national legislation and in fact specify in their treaties that they are applicable in accordance with national legislation.⁶⁴

In addition, the Act is unclear as to reliance on multilateral international criminal law conventions as the basis for a relator's extradition.⁶⁵ These treaties provide, *inter alia*, that state parties are obligated to prosecute or extradite individuals who have allegedly committed the proscribed conduct.⁶⁶ They contain no provision for the mechanism by which extradition is to be accomplished, because they remand to the applicable nation. In the instance where the basis for the extradition request is such a multilateral international criminal law convention, the provisions of the Act are applicable. By structuring the Act as an adjunct to treaties rather than as the generally applicable norm, the legislature neglected to take into account the way in which this would affect reliance upon multilateral international criminal law conventions which contain extradition clauses. Thus, in this respect the Act is ambiguous. Since one of Congress' avowed primary objectives in its reform of existing extradition law and practice is to permit the United States to cooperate internationally in combatting international and transnational criminality,⁶⁷ the Act's failure to specifically provide for reliance upon multilateral international criminal law conventions containing an extradition clause is particularly unfortunate. Yet because of the ambiguity of the relevant language of the Act, the courts could construe it as applicable in such cases, as is discussed below.

VI. TREATY REQUIREMENTS FOR EXTRADITION

Section 3191 of both the Senate version and the House version essentially provide that the United States may lawfully extradite an individual only pursuant to a formal request made by another state in reliance upon a treaty concerning extradition between the United States and the requesting state.⁶⁸ This

⁶⁴These observations were made by this writer before the Senate and House Judiciary Committee hearings on their respective proposed bills. See *Senate Judiciary Hearings on S. 1639, supra* note 3, at 20-23 (testimony of M. Cherif Bassiouni); *House Judiciary Hearings on H.R. 5227, supra* note 4, at 101-102 (testimony of M. Cherif Bassiouni).

⁶⁵For a bibliography of international criminal law conventions, see M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL CODE, supra* note 12, at xix-xxx.

⁶⁶See 1 M.C. BASSIOUNI, *U.S. INTERNATIONAL EXTRADITION, supra* note 12, at ch. I, § 3; BASSIOUNI, *The Common Characteristics of Conventional International Criminal Law, supra* note 12. See also Bassiouni, *General Report on the Juridical Status of the Requesting State Denying Extradition*, XIth International Congress of Comparative Law, Caracas, Venezuela 20 August-5 September 1982, *PROCEEDINGS OF XITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* (in print) (comparative analysis of state law and practice regarding duty to prosecute or extradite).

⁶⁷Senate Judiciary Report on S. 1940, *supra* note 15, at 4; House Judiciary Report on H.R. 6046, *supra* note 23, at 3-4.

⁶⁸The specific language of both bills is as follows:

§ 3191. Extradition in general

The United States may extradite a person to a foreign state pursuant to this chapter only if —
 (a) there is a treaty concerning extradition between the United States and the foreign state; and
 (b) the foreign state requests extradition within the terms of the applicable treaty.

S. 220, *supra* note 7, § 3191; S. 1940, *supra* note 5, § 3191; S. 1639, *supra* note 1, § 3191.

§ 3191. General statement of requirements for extradition

The United States may extradite a person to a foreign state in accordance with this chapter

has been the consistent practice of the United States⁶⁹ with only a few exceptions early on in its practice.⁷⁰ To this extent, therefore, the Act conforms with existing law and practice. Regrettably the Act does not contemplate reciprocity as a basis for extradition without a treaty. This could have been accomplished with an "executive agreement" as a valid legal basis for extradition in the absence of a treaty and on the basis of the national legislation.⁷¹

The Act appears, however, to alter current practice by permitting reliance on multilateral treaties as well as bilateral extradition treaties as a legal basis for extradition. The term "treaty" in the Senate bill is defined as "a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent of the Senate."⁷² The House Bill defines "treaty" as "a treaty, convention or other international agreement that is in force after advice and consent of the Senate."⁷³ It must be noted that the original Senate version of the 1981 Extradition Act, S. 1639, did not intend reliance on multilateral international criminal law conventions containing an extradition clause, but the version reported out by the Judiciary Committee did.⁷⁴ This inclusion was carried forward in the subsequent versions of the Senate bill⁷⁵

only if —

- (1) There is an applicable treaty concerning extradition between the United States and such foreign state;
- (2) the foreign state requests extradition in accordance with the terms of that treaty; and
- (3) the appropriate court issues an order under this chapter that such person is extraditable.

H.R. 3347, *supra* note 8, § 3191; H.R. 2643, *supra* note 8, § 3191; H.R. 6046, *supra* note 5, § 3191; H.R. 5227, *supra* note 2, § 3191.

⁶⁹See *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5 (1936); *Argento v. Horn*, 241 F.2d 258, 259 (6th Cir. 1957), *cert. denied*, 355 U.S. 818 (1957); *Ivancevic v. Artukovic*, 211 F.2d 565, 566 (9th Cir. 1954), *cert. denied*, 348 U.S. 818 (1954).

⁷⁰See 1 J.B. MOORE, *supra* note 42, at 33-35 (1891) (Arguelles case); 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 744-45 (1968) (Koveleskie case) [hereinafter referred to as M. WHITEMAN, DIGEST].

⁷¹See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. II, § 3, pp. 6-9 (review of U.S. law and practice regarding reciprocity as a legal basis for extradition in the absence of a treaty).

⁷²S. 220, *supra* note 7, § 3198(a)(4); S. 1940, *supra* note 5, § 3198(a)(4); S. 1639, *supra* note 1, § 3198(a)(4). In its report on S. 1940, the Senate Judiciary Committee noted that this expansion should not be interpreted such that the chapter would also regulate alternative methods of rendition through Status of Forces Agreements and deportation proceedings. See Senate Judiciary Report on S. 1940, *supra* note 15, at 5-6. For a review and appraisal of these alternative methods, see 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, ch. II, § 3, pp. 9-13, chap. IV, § 1.

⁷³H.R. 3347, *supra* note 8, § 3199(a)(2); H.R. 2643, *supra* note 8, § 3199(a)(2); H.R. 6046, *supra* note 5, § 3199(a)(2); H.R. 5227, *supra* note 2, § 3198(a)(2). The House Judiciary Report specifically noted that the term "treaty" is defined so as to exclude executive agreements. See House Judiciary Report on H.R. 6046, *supra* note 23, at 6. The Committee also stated that this provision should not be construed such that the Act would regulate rendition under Status of Forces Agreements or deportation proceedings. See *id.* at 8 n.15.

⁷⁴See Senate Judiciary Report on S. 1940, *supra* note 15, at 5, wherein it is noted that Section 3191 "refers to a treaty 'concerning extradition' rather than an 'extradition treaty' because an obligation to extradite a particular class of offenders is sometimes included in international agreements other than extradition treaties." The Report then refers in a footnote to the same conventions listed *infra* in note 78.

⁷⁵See S. 1940 as reported by the Senate Foreign Relations Committee in its Report, *supra* note 20, at 16 *et seq.*; S. 220, *supra* note 4, § 3198(a)(4).

and the House bills.⁷⁶ Both the Senate and House Judiciary Committees specifically noted⁷⁷ that these definitions include both bilateral and multilateral treaties, as well as treaties which do not deal specifically with extradition but contain an extradition clause such as conventions on international criminal law,⁷⁸ whether they are in force at the time this legislation has entered into effect or enter into force subsequent thereto. This interpretation would be warranted in recognition of the fact that international criminal law is in a developing state⁷⁹ and that new conventions can be anticipated. If this provision did not exist there would be a need for future revision of the Act.

This provision offers the United States the opportunity to comply with those provisions in multilateral treaties to which it is a signatory which allow reliance on the applicable extradition provisions in these treaties instead of, or in addition to, bilateral treaties.⁸⁰

Curiously, although multilateral treaties ratified by the Senate are as binding on the United States as bilateral treaties, the Department of State has never relied on multilateral treaties for extradition, clinging to bilateral treaties as the only basis for extradition. There is of course no merit to this position,⁸¹ but it is the existing practice, and this provision of the Act raises the question as to whether it should be abandoned altogether, or relied upon only when a bilateral treaty exists with a requesting state which is also a signatory to the multilateral convention in question. These multilateral conventions, however,

⁷⁶See H.R. 3347, *supra* note 8, § 3199(a)(2); H.R. 5227, *supra* note 2, § 3199(a)(2); H.R. 6046, *supra* note 5, § 3199(a)(2) as reported by the House Judiciary Committee in its report, *supra* note 23, at 6; H.R. 2643, *supra* note 8, § 3199(a)(2).

⁷⁷Senate Judiciary Report on S. 1940, *supra* note 15, at 5; House Judiciary Report on H.R. 6046, *supra* note 23, at 6.

⁷⁸E.g., Single Convention on Narcotic Drugs, 30 March 1961, 520 U.N.T.S. 151, 18 U.S.T. 1407, T.I.A.S. No. 6298; Protocol Amending the Single Convention on Narcotic Drugs, March 25, 1972, U.N. Doc. E/Conf. 63/9, 26 U.S.T. 1439, T.I.A.S. No. 8118; Convention on Psychotropic Substances, February 21, 1971, 1019 U.N.T.S. 175, 32 U.S.T. 543, T.I.A.S. No. 9725; OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, February 2, 1971, OAS Doc. Ag/doc. 88 rev. 1 corr. 1, 27 U.S.T. 3949, T.I.A.S. No. 8413; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973, G.A. Res. A/3166 (XXVIII), 28 U.N. GAOR Supp. (No. 30) 146, U.N. Doc. A/9030, 28 U.S.T. 1975, T.I.A.S. No. 8532; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, September 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, T.I.A.S. No. 6768; Hague Convention on the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.I.A.S. No. 7192; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 25, 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, T.I.A.S. No. 7570. For a list of international instruments on international criminal law and a bibliography of international crimes, see M.C. BASSIOUNI, INTERNATIONAL CRIMINAL CODE, *supra* note 12, at xix-xxx.

⁷⁹See, e.g., *id.* at 19-22. See also 1 M.C. BASSIOUNI & V.P. NANDA, *supra* note 12, at 1-158.

⁸⁰This expansion of the legal basis of extradition to include multilateral international criminal law conventions containing an extradition clause was suggested by this writer before Senate and House hearings on proposed versions of the Act. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 21; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 98, 102. In written statements submitted to both Committees, specific reference was made to those treaties listed *supra* in note 78.

⁸¹For a critical view of the practice, see Bassiouni, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 74 PROC. AM. SOC'Y INT'L L. 273 (1980).

do not contemplate that they will be supplementary to bilateral extradition treaties; they are intended to permit reliance upon their extradition provisions only *in the absence of* a bilateral treaty.

Although the provision of the Act defining "treaty" can be read to permit reliance upon multilateral international criminal law conventions as a legal basis for extradition, it could also be given a contrary interpretation, namely that multilateral conventions would be relied upon only where in addition thereto there is a bilateral extradition treaty between the requesting state and the United States. Thus the multilateral convention containing an extradition clause would merely supplement the list of extraditable offenses under the bilateral treaty. The lack of clarity as to the legislature's intent is as regrettable as is the absence of a clear intent to rely on such multilateral conventions without the need for a further bilateral treaty, and the applicability in such an event of the Act to extradition proceedings initiated on this basis.

Section 3191 of the Act states that the requirements of the applicable treaty must be found to have been satisfied.⁸² This emphasizes that the treaty provisions whether substantive or procedural prevail over the provisions of the Act.

Unlike the House bill, the Senate version does not explicitly require that a court order finding the relator extraditable be issued in order for extradition to be appropriate. Instead, it provides that there be "a treaty concerning extradition between the United States and a foreign state" and that "the foreign state request extradition within the terms of the applicable treaty."⁸³ The Senate Judiciary Committee Report, however, noted that previous federal law implicitly required a court order before extradition could be performed.⁸⁴ Presumably the Senate version carries forward this implicit requirement as well.

VII. FORM OF THE REQUEST IN GENERAL

Both the Senate and House bills contain a similar section which provides that a "request" from a foreign government (hereinafter referred to as requesting state) must be made in form and in substance according to the requirements

⁸²S. 220, S. 1940, and S. 1639 require that "the foreign state request extradition within the terms of the applicable treaty." S. 220, *supra* note 7, § 3191(b); S. 1940, *supra* note 5, § 3191(b); S. 1639, *supra* note 1, § 3191(b). H.R. 3347, H.R. 2643, H.R. 6046, and H.R. 5227 require that "[t]he foreign state request extradition in accordance with the terms of [the applicable] treaty . . ." H.R. 3347, *supra* note 8, § 3191(2); H.R. 2643, *supra* note 8, § 3191(2); H.R. 6046, *supra* note 5, § 3191(2); H.R. 5227, *supra* note 2, § 3191(2). The House Judiciary Committee stated in its report that the language "in accordance with the terms of" was chosen instead of "within the terms of" in order to "achieve greater clarity" but was intended to have the same meaning as that of the Senate bill. See House Judiciary Report on H.R. 6046, *supra* note 23, at 6.

⁸³S. 220, *supra* note 7, § 3191(a), (b); S. 1940, *supra* note 5, § 3191(a), (b); S. 1639, *supra* note 1, § 3191(a), (b). The House version states that "the appropriate court [must] issue an order under this chapter that such person is extraditable." H.R. 3347, *supra* note 8, § 3191(3); H.R. 2643, *supra* note 8, § 3191(3); H.R. 6046, *supra* note 5, § 3191(3); H.R. 5227, *supra* note 2, § 3191(3).

⁸⁴Senate Judiciary Report on S. 1940, *supra* note 15, at 5. The provisions of S. 220, S. 1940, and S. 1639 are identical regarding this point. See S. 1639, *supra* note 1, § 3191(a), (b); S. 1940, *supra* note 5, § 3191(a), (b); S. 220, *supra* note 7, § 3191(a), (b).

of each treaty.⁸⁵ This provision subordinates the legislation with respect to the form and substance of a request to the requirements of each and every treaty. Thus the substantive and formal requirements of each request will depend on the relevant provisions of the applicable treaty; only where the applicable treaty is silent will the Act apply. This situation will of course, create as much diversity in form and substance of requests as there are treaties. Clearly a better approach would have been to have the Act control with respect to substance and form, or at least with respect to form, particularly the type of documentation required and certification thereof. Such an approach would have insured uniformity in the practice and would have made the task easier for those entrusted with the administration of extradition proceedings. It can be argued, however, that because of the diversity of the legal systems of states with which the United States has extradition relations it is difficult for the United States to impose by legislation a uniform set of requirements that will satisfy all the states with which it has or may entertain such relations. Also, even though such requirements, though formal, have substantive legal significance they are not therefore readily acceptable by all states with which the United States seeks to have extradition relations. In this respect the Act preserves existing legislation and practice.⁸⁶

VIII. RENEWED REQUESTS

The question of renewed requests is dealt with in the House versions⁸⁷ but not in the Senate versions.⁸⁸ It is not present in existing legislation but has been the subject of litigation when the applicable extradition treaty contains what is now commonly termed a "double jeopardy" clause.⁸⁹ Such a provision is "common to most extradition treaties"⁹⁰ and usually states that extradition shall not be granted "[w]hen the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the

⁸⁵S. 220, *supra* note 7, § 3191(b); S. 1940, *supra* note 5, § 3191(b); S. 1639, *supra* note 1, § 3191(b); H.R. 3347, *supra* note 8, § 3191(2); H.R. 2643, *supra* note 8, § 3191(2); H.R. 6046, *supra* note 5, § 3191(2); H.R. 5227, *supra* note 2, § 3191(2). This includes the substantive requirements discussed below and the documentation and evidence needed to be presented as well as the certification of all necessary documents. See S. 220, *supra* note 7, § 3194(c); S. 1940, *supra* note 5, § 3194(c); S. 1639, *supra* note 1, § 3194(c); H.R. 3347, *supra* note 8, § 3194(g); H.R. 2643, *supra* note 8, § 3194(g); H.R. 6046, *supra* note 5, § 3194(g); H.R. 5227, *supra* note 2, § 3194(g), discussed *infra* at notes 249-68 and accompanying text.

⁸⁶See Senate Judiciary Report on S. 1940, *supra* note 15, at 5; House Judiciary Report on H.R. 6046, *supra* note 23, at 6.

⁸⁷The provision states:

If the Attorney General has previously sought an order that a person is extraditable under this chapter with respect to a specific extradition request of a foreign state the Attorney General may not file another complaint under this section based upon the same factual allegations as a previous complaint, unless the Attorney General shows good cause for filing another complaint.

H.R. 3347, *supra* note 8, § 3192(a)(2); H.R. 2643, *supra* note 8, § 3192(a)(2); H.R. 6046, *supra* note 5, § 3192(a)(2); H.R. 5227, *supra* note 2, § 3192(a)(2).

⁸⁸See S. 220, *supra* note 7; S. 1940, *supra* note 5; S. 1639, *supra* note 1.

⁸⁹See, e.g., *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Galanis v. Pallanck*, 568 F.2d 234 (2d Cir. 1977).

⁹⁰6 WHITEMAN, DIGEST, *supra* note 70, at 1054.

requested Party for the offense for which his extradition is requested.”⁹¹ The new House provision is thus in the nature of a statutory double jeopardy clause embodying the traditional doctrine of *res judicata*. It provides that if the Attorney General has previously sought an order for the extradition of an individual for a given offense based on a request by a given state and that request was denied (by the court) he cannot make a new request for the same individual based on the same offense at the request of the same state except upon a showing of good cause. Presumably this means that the same or substantially same issues,⁹² save in the case of discovery of new evidence unknown at the time of the first request, cannot be relitigated unless the Attorney General shows good cause to the satisfaction of the court. Thus, a new request based on new factual allegations can be presented.

It is unclear from the legislative history as to whether this provision is to be construed in the nature of a statutory double jeopardy clause to be governed by relevant federal criminal precedents arising out of national criminal jurisprudence or whether it partakes of the civil doctrine of *res judicata* because of the *sui generis* nature of extradition. The legislative history as expressed in the House Judiciary Committee report is that a new request cannot be based solely on the fact that the requesting state has failed to produce evidence of probable cause sufficient to satisfy the court when such evidence was available to it at the time of the hearing resulting in the court's refusal to grant the request.⁹³

It is assumed by this writer, therefore, that the new request should be based on: (1) newly discovered evidence not available at the time of the first hearing, and (2) a showing of due diligence and good faith on the part of the requesting state and on the part of the United States government presenting the case on behalf of the requesting state, all of which are implicit in a showing of good cause. Thus the negligence, lack of due diligence, lack of good faith, pro-

⁹¹Treaty on Extradition Between the United States and Italy, January 18, 1973, 26 U.S.T. 493, T.I.A.S. No. 8052, (Article VI(1)). See also Convention on Extradition Between the United States and Sweden, October 24, 1961, 14 U.S.T. 1845, T.I.A.S. No. 5496 (Article V(1)); Convention Relating to Extradition Between the United States and Israel, December 10, 1962, 14 U.S.T. 1707, T.I.A.S. No. 5476 (Article VI (1)); Treaty on Extradition Between the United States and New Zealand, January 12, 1970, 22 U.S.T. 1, T.I.A.S. No. 7035 (Article VI(1)); Treaty on Extradition Between the United States and Spain, May 29, 1970, 22 U.S.T. 737, T.I.A.S. No. 7136 (Article V(1)); Treaty on Extradition Between the United States and Argentina, January 21, 1972, 23 U.S.T. 3501, T.I.A.S. No. 7510 (Article 7(a)); Treaty on Extradition Between the United States and Paraguay, May 24, 1973, 25 U.S.T. 967, T.I.A.S. No. 7838 (Article 5(1)); Treaty on Extradition Between the United States and Denmark, June 22, 1972, 25 U.S.T. 1293, T.I.A.S. No. 7864 (Article 7(1)); Treaty on Extradition Between the United States and Australia, May 14, 1974, 27 U.S.T. 957, T.I.A.S. No. 8234 (Article VII(1)).

⁹²For an analysis of the concept of “same or substantially the same offense,” see M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 452-59 (1974), relied upon on this issue in *Sindona v. Grant*, 619 F.2d 167, 177-78 (2d Cir. 1980). See also 2 M.C. BASSIOUNI, *U.S. INTERNATIONAL EXTRADITION*, *supra* note 12, at ch. VIII, § 4, pp. 4-12.

⁹³See House Judiciary Report on H.R. 6046, *supra* note 23, at 8. The provision regarding renewed requests is the same in H.R. 5227, H.R. 6046, H.R. 2643, and H.R. 3347. See H.R. 5227, *supra* note 2, § 3192(a)(2); H.R. 6046, *supra* note 5, § 3192(a)(2); H.R. 2643, *supra* note 8, § 3192(a)(2); H.R. 3347, *supra* note 8, § 3192(a)(2).

secutorial strategy of withholding evidence, and the political nature of the case or the relator would not be considered within the meaning of "good cause," and the government would be barred from presenting a renewed request under these circumstances.

IX. PRIORITY IN REQUESTS

Unlike existing legislation, this question, which is dealt with in the House version⁹⁴ but not in the Senate one,⁹⁵ sets forth a hierarchy in the priority of requests whenever more than one state presents a request for the same individual and for the same or different offenses. In this instance it is the Secretary of State and not the Attorney General who has the unreviewable discretion, presumably because of the foreign relations implications of the decision, to determine which request to honor. In so doing, the House bill requires that the Attorney General take into consideration the following relevant factors:

- (A) those set forth in an applicable treaty concerning extradition;
- (B) the nationality of the individual;
- (C) the state in which the offense is alleged to have occurred; and
- (D) if different offenses are involved, which offense is punishable by the most severe penalty, and if the penalties are substantially equal the order in which the requests were received.⁹⁶

This necessary provision, however, subordinates the ranking of jurisdictional priorities to the applicable treaty.⁹⁷ Curiously, it favors the active personality theory⁹⁸ over the territorial principle,⁹⁹ ignores the passive personality theory¹⁰⁰ entirely and introduces a new jurisdictional notion based solely on the severity of the penalty. This last notion is new in United States law and practice¹⁰¹ but is found in the European Convention on Extradition.¹⁰²

⁹⁴See H.R. 3347, *supra* note 8, § 3192(a)(3); H.R. 2643, *supra* note 8, § 3192(a)(3); H.R. 6046, *supra* note 5, § 3192(a)(3). A section regarding multiple requests was not included in the original House bill, H.R. 5227, but was inserted in the bill's "mark up" and thus included in H.R. 6046.

⁹⁵See S. 220, *supra* note 7; S. 1940, *supra* note 5; S. 1639, *supra* note 1.

⁹⁶H.R. 3347, *supra* note 8, § 3192(a)(3); H.R. 2643, *supra* note 8, § 3192(a)(3); H.R. 6046, *supra* note 5, § 3192(a)(3).

⁹⁷See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VI; FELLER, *Jurisdiction over Offenses with a Foreign Element*, in 2 M.C. BASSIOUNI & V.P. NANDA, *supra* note 12, at 5 *et seq.*; RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tentative Draft No. 2), §§ 401-404, 441-443 (1981); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tentative Draft No. 3), §§ 401, 419-420, 431-433 (1982). See also Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 2*, 75 AM. J. INT'L L. 987 (1981); Henkin, *Restatement of the Foreign Relations Law of the United States (Revised): Tentative Draft No. 3*, 76 AM. J. INT'L L. 653 (1982).

⁹⁸The active personality (nationality) theory of jurisdiction confers jurisdiction to prosecute upon the alleged offender's state of nationality. See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VI, § 3.

⁹⁹The territorial theory confers jurisdiction to prosecute upon the state in which the alleged offense occurred. See 1 *id.* at ch. VI, § 2.

¹⁰⁰The passive personality theory confers jurisdiction to prosecute upon the state of nationality of the victim of the alleged offense. See 1 *id.* at ch. VI, § 4.

¹⁰¹See 1 *id.* at ch. IV.

¹⁰²E.T.S. No. 24, Article 2 (1957).

X. INITIATION OF THE PROCEEDINGS

This section is similar in both the Senate and House versions. It provides that extradition proceedings are to be initiated by the Attorney General as the complainant.¹⁰³ Thus, no action can be commenced by any other party purporting to represent the requesting state. This changes existing practice which authorizes the action to be brought not only by the Attorney General but also by a representative of the requesting state, including private counsel.¹⁰⁴ This aspect of current United States practice is anachronistic; most major legal systems of the world require that the requesting state be represented by the government of the requested state.¹⁰⁵ Present United States practice is incompatible with the policy considerations upon which extradition is based, since extradition involves the foreign relations of the United States and its treaty obligations, and the proceedings are criminal in nature rather than civil. The Act remedies these aspects of current practice.¹⁰⁶

The Act also states that these actions must be commenced in the federal district court in whose district the individual is believed to be found.¹⁰⁷ Thus,

¹⁰³The Senate version states that "[t]he Attorney General may file a complaint charging that a person is extraditable." S. 220, *supra* note 7, § 3192(a); S. 1940, *supra* note 5, § 3192(a); S. 1639, *supra* note 1, § 3192(a). The House version provides that "[t]he United States District Court for the district in which the person sought to be extradited is found may issue an order in accordance with this chapter that such person is extraditable, upon a complaint filed by the Attorney General." H.R. 3347, *supra* note 8, § 3192(a)(1); H.R. 2643, *supra* note 8, § 3192(a)(1); H.R. 6046, *supra* note 5, § 3192(a)(1); H.R. 5227, *supra* note 2, § 3192(a)(1).

¹⁰⁴Present federal law does not specify who can file a complaint on behalf of the requesting state. This has forced the court to determine who is "authorized" to represent the requesting state on a case-by-case basis. See, e.g., *U.S. ex rel. Capputo v. Kelley*, 92 F.2d 603 (2d Cir. 1937), *cert. denied*, 303 U.S. 635 (1938) (consular representatives).

¹⁰⁵See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. IX, § 1, p. 3.

¹⁰⁶The Senate and House Judiciary Committee Reports also noted that in recent years it has become common practice for the Attorney General to represent the requesting state, either because this is called for in the applicable extradition treaty or because it is required in treaties regarding mutual assistance in legal matters. See Senate Judiciary Report on S. 1940, *supra* note 15, at 6; House Judiciary Report on H.R. 6046, *supra* note 23, at 7.

¹⁰⁷The Senate bill provides that "[t]he Attorney General shall file the complaint in the United States district court — (1) for the district in which the person may be found; or (2) for the District of Columbia, if the Attorney General does not know where the person may be found." S. 220, *supra* note 7, § 3192(a)(1), (2); S. 1940, *supra* note 5, § 3192(a)(1), (2); S. 1639, *supra* note 1, § 3192(a)(1), (2).

The House bill states that

[t]he United States district court for the district in which the person sought to be extradited is found may issue an order in accordance with this chapter that such person is extraditable . . .

The Attorney General may file a complaint under this chapter in the United States District Court for the District of Columbia if the Attorney General does not know where the person sought may be found.

H.R. 3347, *supra* note 8, §§ 3192(a)(1), 3192(c); H.R. 2643, *supra* note 8, 3192(a), 3192(c); H.R. 6046, *supra* note 5, §§ 3192(a)(1), 3192(c); H.R. 5227, *supra* note 2, § 3192(c).

S. 220, S. 1940, and S. 1639 define "court" as

(A) a United States district court established pursuant to section 132 of title 28, United States Code, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

(B) a United States Magistrate authorized to conduct an extradition proceedings . . .

S. 220, *supra* note 7, §§ 3198(a)(1)(A), 2198(a)(1)(B); S. 1940, *supra* note 5, §§ 3198(a)(1)(A), 3198(a)(1)(B); S. 1639, *supra* note 1, §§ 3198(a)(1)(A), 3198(a)(1)(B).

H.R. 6046, H.R. 3347, H.R. 2643, and H.R. 5227 provide that "the term 'United States district court' includes the District Court of Guam, the District Court of the Virgin Islands, and the District Court of the Northern Mariana Islands, and Guam, the Virgin Islands, and the Northern Mariana Islands are, respectively, the districts for such district courts." H.R. 3347, *supra* note 8, § 3199(a)(4); H.R. 2643, *supra* note 8, § 3199(a)(4); H.R. 6046, *supra* note 5, § 3199(a)(4); H.R. 5227, *supra* note 2, § 3198(a)(4).

under the Act, unlike existing legislation, no proceedings may be commenced before state judges.¹⁰⁸ Current legislation represents another historical anachronism, since the federal system of the United States and the foreign relations nature of extradition make it so obvious that the matter should be exclusively within federal jurisdiction although it has not been so in practice.

The Act also provides that the Attorney General may commence an action and seek a warrant in the Federal District Court for the District of Columbia if the whereabouts of the person sought are not known to him at that time.¹⁰⁹ This change adds a helpful new dimension to existing legislation which permits warrants to be issued only in the district where the relator is believed to be found. Thus until his whereabouts are discovered no warrant can be issued.

Under the Act, if the person sought has been arrested on the basis of a warrant issued by the Federal District Court for the District of Columbia, the matter will then be transferred to the district court in whose district the arrest has been performed. Provision for transfer of the proceedings from the Federal District Court for the District of Columbia to the district court where the relator is found is specifically included in the House version but not in the Senate bill. The House bill states that "[w]hen the person is found, the matter shall be transferred to the United States district court to which the person arrested is taken under subsection (d) of this section."¹¹⁰ Subsection (d) specifies that the relator upon arrest "shall be taken . . . before the nearest available United States district court . . ."¹¹¹ The Senate version contains no provision for transfer of the proceedings, although it does state that upon arrest the relator "should be taken . . . before the nearest available court . . ."¹¹² The Senate Judiciary Committee's Report, similarly, makes no reference to transfer of the proceedings.¹¹³ It would appear that nothing would preclude such transfer to the district court which is geographically closest to the place of arrest, as opposed to the one which would have jurisdiction by virtue of the geographical limits established in the judicial organization of the federal district courts.¹¹⁴

¹⁰⁸Under existing legislation, state judges are authorized to hear extradition cases. See 18 U.S.C. § 3184 (1976).

¹⁰⁹See *supra* note 107.

¹¹⁰H.R. 3347, *supra* note 8, § 3192(c); H.R. 2643, *supra* note 8, § 3192(c); H.R. 6046, *supra* note 5, § 3192(c); H.R. 5227, *supra* note 2, § 3192(c).

¹¹¹H.R. 3347, *supra* note 8, § 3192(d); H.R. 2643, *supra* note 8, § 3192(d); H.R. 6046, *supra* note 5, § 3192(d); H.R. 5227, *supra* note 2, § 3192(d).

¹¹²S. 220, *supra* note 7, § 3192(c); S. 1940, *supra* note 5, § 3192(c); S. 1639, *supra* note 1, § 3192(c).

¹¹³With respect to this subsection, which is the same in S. 220, S. 1940, and S. 1639, the Senate Judiciary Committee preferred to give an explanation of the term "found," by stating, "[T]he word 'found' is intended to have its usual, non-technical meaning and permits extradition proceedings to be initiated in any district in which the fugitive can be physically apprehended, without regard to the manner in which the fugitive entered the district." Senate Judiciary Report on S. 1940, *supra* note 15, at 7.

¹¹⁴This view is supported by a statement in the House Judiciary Report regarding the House bill's provision on arrest, which requires that the relator be brought before the "nearest available United States district court." H.R. 3347, *supra* note 8, § 3192(d)(1); H.R. 2643, *supra* note 8, § 3192(d)(1); H.R. 6046, *supra* note 5, § 3192(d)(1); H.R. 5227, *supra* note 2, § 3192(d)(1). The House Judiciary Report notes that this provision:

permits the government to take the detained person before a district court in a district other than

The purpose for this provision is to have the arrested person brought before a magistrate or a judge without unnecessary delay¹¹⁵ although it may appear to provide an opportunity to the government for limited forum shopping.¹¹⁶

The Act does not provide for the docket-setting of the action which to date is part of the civil docket. Presumably this practice would continue unless changed by Supreme Court rule as provided for in section 3199(f) of the House bill.¹¹⁷

XI. THE COMPLAINT

A complaint is the basis for commencing extradition proceedings and is the basis upon which the arrest warrant may be issued. All subsequent proceedings, such as the hearing and the order of the court, are based on the complaint. A complaint may therefore be amended or dismissed by order of the court, by stipulation of the parties, or by the government based on prosecutorial discretion.

Under the Act, the complaint must be made by the Attorney General under oath or affirmation. This is similar to verified complaints in civil matters¹¹⁸ and to informations in criminal matters,¹¹⁹ although the Act does not specify which of the two practices is the analogous one. This section provides that the form of the request is subject to the requirements of the applicable treaty; nonetheless, the same provision also requires the Attorney General to verify the complaint, irrespective of treaty provisions. This requirement which appears essentially to be an internal legal procedure is nonetheless controlling even if a treaty does not require verification of a complaint. This is the only provision in the Act which subordinates a treaty to the Act. In the unlikely event of a

the one in which the person is found if a court in another location is closer. This authority is granted for the convenience of the government and the person sought. It should not be read as authority for the government to choose the court in which to proceed based on factors other than convenience.

House Judiciary Report on H.R. 6046, *supra* note 23, at 10.

The Senate Judiciary Report, similarly, notes with regard to the requirement that the relator be brought before the "nearest available court," S. 220, *supra* note 7, § 3192(c), S. 1940, *supra* note 5, § 3192(c), S. 1639, *supra* note 1, § 3192(c), that "[t]here is no requirement that the extradition hearing take place in the State in which the fugitive is found . . ." Senate Judiciary Report on S. 1940, *supra* note 15, at 8.

¹¹⁵Both congressional versions of the Act require that the relator be brought before the district court without unnecessary delay. See S. 220, *supra* note 7, § 3192(c); S. 1940, *supra* note 5, § 3192(c); S. 1639, *supra* note 1, § 3192(c); H.R. 3347, *supra* note 8, § 3192(d)(1); H.R. 2643, *supra* note 8, § 3192(d)(1); H.R. 6046, *supra* note 5, § 3192(d)(1); H.R. 5227, *supra* note 2, § 3192(d). This aspect of the extradition hearing is given more detailed considerations. See *infra* notes 145-48 and accompanying text.

¹¹⁶The House Judiciary Committee specifically stated, however, that the provision should not be used by the Government to engage in forum shopping. See House Judiciary Report on H.R. 6046, *supra* note 23, at 10, quoted *supra* note 114.

¹¹⁷H.R. 3347, *supra* note 8, § 3199(f); H.R. 2643, *supra* note 8, § 3199(f); H.R. 6046, *supra* note 5, § 3199(f); H.R. 5227, *supra* note 2, § 3198(f). See *infra* note 423 and accompanying text.

¹¹⁸See FED. R. CIV. P. 23.1 (secondary action by shareholders); FED. R. CIV. P. 27(a) (depositions to perpetuate testimony); FED. R. CIV. P. 65 (injunctions); FED. R. CIV. P. 66 (receivers). See generally 2A J. MOORE, 8 J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 11.03 (2d ed. 1984) [hereinafter cited as MOORE'S FEDERAL PRACTICE].

¹¹⁹See FED. R. CRIM. P. 7 (information as basis for prosecution); FED. R. CRIM. P. 3 (complaint as basis for arrest). See generally 8 MOORE'S FEDERAL PRACTICE, *supra* note 118, at chs. 3, 7.

conflict between a treaty provision and this provision of the Act, under established constitutional jurisprudence the treaty will prevail if it is subsequent to the Act.¹²⁰

A practical problem could arise with respect to the verification requirement in the event that a treaty does not require the requesting state to verify its request to the United States, or to have its supporting documents presented under oath or affirmation, while this section requires the Attorney General to present a complaint on oath or affirmation which would certainly have to be based on the representations of the requesting state. This would place the Attorney General in a position of having to present a complaint under oath or affirmation based upon a request by a foreign state and upon documents that such a state might present without being under oath or affirmation. The Secretary of State of course could refuse to accept the request unless verified, and could return it through diplomatic channels to the requesting state for compliance. The requesting state could object if the applicable treaty did not contain a general clause which would require compliance with national legislation in matters not specifically within the treaty in question.

Both the Senate and House bills contain a detailed subsection setting forth the required contents of the complaint and supporting documents.¹²¹ A distinction exists between the requirements for a complaint to support an arrest warrant and for a complaint to support a provisional arrest warrant. This distinction is specifically stated in the legislative history of the bills, but not in the Act itself.¹²² Under both bills, the complaint to support an arrest must specify the offense for which extradition is sought and be accompanied by a copy of the request for extradition and the evidence and documents required by the applicable treaty.¹²³

A complaint which will support a provisional arrest warrant under the House version of the Act must contain the following:

- (i) information sufficient to identify the person sought;
- (ii) a statement —

(I) of the essential factual allegations of conduct constituting the offense that the person sought is believed to have committed; or

¹²⁰See *Charlton v. Kelly*, 229 U.S. 447, 465 (1913); *Grin v. Shine*, 187 U.S. 181, 191 (1902); *The Head Monkey Cases*, 112 U.S. 580, 598-99 (1884).

¹²¹See S. 220, *supra* note 7, § 3192(b); S. 1940, *supra* note 5, § 3192(b); S. 1639, *supra* note 1, § 3192(b); H.R. 3347, *supra* note 8, § 3192(b); H.R. 2643, *supra* note 8, § 3192(b); H.R. 6046, *supra* note 5, § 3192(b); H.R. 5227, *supra* note 2, § 3192(b).

¹²²See Senate Judiciary Report on S. 1940, *supra* note 15, at 7-8; House Judiciary Report on H.R. 6046, *supra* note 23, at 9-10.

¹²³S. 220, *supra* note 7, § 3192(b)(1); S. 1940, *supra* note 5, § 3192(b)(1); S. 1639, *supra* note 1, § 3192(b)(1); H.R. 3347, *supra* note 8, § 3192(b)(2), (b)(4)(A); H.R. 2643, *supra* note 8, § 3192(b)(2), (b)(4)(A); H.R. 6046, *supra* note 5, § 3192(b)(2), (b)(4)(A); H.R. 5227, *supra* note 2, § 3192(b)(2), (b)(4)(A). The House bill further provides that the complaint shall also "contain any matter not otherwise required by this chapter but required by the applicable treaty concerning extradition." H.R. 3347, *supra* note 8, § 3192(b)(3); H.R. 2643, *supra* note 8, § 3192(b)(3); H.R. 6046, *supra* note 5, § 3192(b)(3); H.R. 5227, *supra* note 2, § 3192(b)(3).

- (II) that a judicial document authorizing the arrest or detention of such person on account of accusation or conviction of a crime is outstanding in the foreign state seeking extradition; and
- (iii) a description of the circumstances justifying such person's arrest.¹²⁴

The Senate version of the Act is substantially similar to that of the House, in that it requires the information and documentation specified above.¹²⁵ The Senate's requirement is different in that it provides an alternative to these requirements. Thus, if the specified information and documentation are not provided, the complaint will nonetheless be deemed sufficient if it contains "such other information as is required by the applicable treaty . . ."¹²⁶

The hybrid legislative approach to extradition proceedings is once again manifested in this provision which describes the requirements of the complaint partly as if it were a criminal information,¹²⁷ and partly as a verified civil complaint.¹²⁸ The legislature's approach fails to take into account that courts must characterize the nature of the complaint in order to determine its sufficiency. Because of the mixed nature of the requirements stated in the Act, courts will have to grapple with a lack of clarity as to which characterization is controlling. If the House provision in section 3199(f) is ultimately enacted, a lack of uniformity between the circuits regarding the sufficiency of complaints could result until the Supreme Court decides the question either by decision or under its rule-making authority.

The fact that this provision is a codification of existing jurisprudence¹²⁹ does not obviate the difficulties presented by its mixed nature. The jurisprudence upon which courts rely in order to review the sufficiency of that which has evolved through prior practice is not identical to its new task of statutory inter-

¹²⁴H.R. 3347, *supra* note 8, § 3192(b)(4)(B); H.R. 2643, *supra* note 8, § 3192(b)(4)(B); H.R. 6046, *supra* note 5, § 3192(b)(4)(B); H.R. 5227, *supra* note 2, § 3192(b)(4)(B).

¹²⁵Section 3192(b)(2) of the Senate bill states that a complaint for a provisional arrest shall contain —

- (i) information sufficient to identify the person sought;
 - (ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and
 - (iii) a description of the circumstances that justify the person's arrest; or
- (B) shall contain such other information as is required by the applicable treaty; and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

S. 220, *supra* note 7, § 3192(b)(2); S. 1940, *supra* note 5, § 3192(b)(2); S. 1639, *supra* note 1, § 3192(b)(2).

¹²⁶S. 220, *supra* note 7, § 3192(b)(2); S. 1940, *supra* note 5, § 3192(b)(2); S. 1639, *supra* note 1, § 3192(b)(2). The Senate versions also differ from those of the House in that the Senate bills do not provide that the appropriate documents from the requesting state may prove the relator's conviction, rather than his indictment or other form of accusation, of the offenses for which his extradition is requested. It is assumed that this is a mere technical oversight of drafting which does not imply that an extradition request cannot be based upon the relator's conviction of the offenses in question in the requesting state.

¹²⁷*See supra* note 119.

¹²⁸*See supra* note 118.

¹²⁹*See* Senate Judiciary Report on S. 1940, *supra* note 15, at 7-8; House Judiciary Report on H.R. 6046, *supra* note 23, at 9-10. *See generally* 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. IX, § 2, pp. 4-5.

pretation in light of new legislation. Thus, previously valid precedent may become the subject of new controversy, unless the new legislation is clear or made clear thereafter.

This provision also contains certain substantive requirements for extradition which are couched in terms of elements of the complaint, the absence of which could presumably become grounds for dismissal of the complaint. The provision is also formulated in terms of procedural norms applicable to this stage of the proceedings. The mixture within this provision between substantive requirements, procedural norms, and formal rules of practice is unfortunate because it lumps together requirements of such divergent legal significance which should be formulated separately. This confusion is all too frequent in a number of other provisions of the Act, as discussed contextually in this article.

This provision also raises a problem with respect to the sufficiency of the complaint and the consequences deriving from a lack of sufficiency. The substantive requirements stated in this section are the same requirements which are reiterated in subsequent sections of the Act as necessary for a finding of extraditability.¹³⁰ The question arises, however, as to whether these requirements are indispensable elements of the complaint, the absence of which would be grounds for dismissal, and if so whether dismissal would be with or without prejudice.¹³¹ In other words, it is unclear whether the complaint would be considered as governed by the Federal Rules of Civil Procedure on complaints¹³² or the Federal Rules of Criminal Procedure on informations.¹³³ An additional problem arises under the House version, which restricts the Attorney General's ability to file new complaints, under section 3192(a)(2).¹³⁴ It would appear that the House version would require dismissal with prejudice in order for the court to give effect to the requirements of section 3192(a)(2) precluding a new filing as discussed in Part VIII of this article.

In grappling with these issues, courts will obviously have to determine the predominance of either the civil or the criminal aspects of this hybrid legislative approach. If the court's inquiry is varied from section to section, it is likely that this section regarding complaints will be characterized as partaking of civil procedure rather than criminal. If the court's inquiry is broadened to consider this section in the context of the overall nature of the Act, however, it is more likely to conclude that the criminal nature of the process is predominant over

¹³⁰See S. 220, *supra* note 7, § 3194(d); S. 1940, *supra* note 5, § 3194(d); S. 1639, *supra* note 1, § 3194(d); H.R. 3347, *supra* note 8, § 3194(d)(1); H.R. 2643, *supra* note 8, § 3194(d)(1); H.R. 6046, *supra* note 5, § 3194(d)(1); H.R. 5227, *supra* note 2, § 3194(d)(1).

¹³¹See FED. R. CIV. P. 41(b) (dismissal of complaint with prejudice); FED. R. CRIM. P. 7(c), 12 (dismissal of indictment or information for error or omission which misled defendant to his prejudice). Neither the Senate nor the House Judiciary Report addresses this issue.

¹³²See *supra* notes 118, 131.

¹³³See *supra* notes 119, 131.

¹³⁴See H.R. 3347, *supra* note 8, § 3192(a)(2); H.R. 2643, *supra* note 8, § 3192(a)(2); H.R. 6046, *supra* note 5, § 3192(a)(2); H.R. 5227, *supra* note 2, § 3192(d)(2). See also *supra* notes 88-93 and accompanying text.

its civil aspects. This contradictory result could have been avoided had the Act been more specific on this and similar issues.

Nothing in the Act or any of the various bills refers to prosecutorial discretion in presenting, amending, or withdrawing a complaint. It is assumed that such discretion as is now practiced in criminal cases will apply.¹³⁵

XII. JUDICIAL ACTION UPON FILING OF A COMPLAINT: SUMMONS, ARREST AND PRELIMINARY HEARING

The Senate and House versions of the Act contain similar though not identical provisions regarding summons, arrest warrants, and the preliminary hearing.¹³⁶ The major difference between the versions is in their treatment of the bail aspects of this phase of the practice. Both provide that upon the filing of a complaint the district court shall issue a warrant for the individual's arrest or, if the Attorney General so requests, a summons for the individual's appearance at the extradition hearing. The summons for appearance is a new feature that does not exist under the present legislation.¹³⁷ The Act does not, however, provide standards for distinguishing between those cases in which a summons can be issued and those in which an arrest warrant is more appropriate. The Attorney General apparently has complete discretion, but the question of abuse of discretion is likely to be the subject of litigation.¹³⁸

Under existing legislation a warrant for provisional arrest can be issued

¹³⁵See generally 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. IX, § 2.

¹³⁶S. 220, S. 1940, and S. 1639 contain the following provision on these aspects:

(c) ARREST OR SUMMONS. — Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

S. 220, *supra* note 7, § 3192(c); S. 1940, *supra* note 5, § 3192(c); S. 1639, *supra* note 1, § 3192(c).

The comparable sections of H.R. 3347, H.R. 2643, H.R. 6046, and H.R. 5227 state the following: Upon the filing of a complaint under this section, the court shall issue a warrant for the arrest of the person sought, or if the Attorney General so requests, a summons to such person to appear at an extradition hearing under this chapter. The warrant or summons shall be executed and returned in the manner prescribed for the execution and return of a warrant or summons, as the case may be, under the Federal Rules of Criminal Procedure. A person arrested under this section shall be taken without unnecessary delay before the nearest available United States district court for further proceedings under this chapter.

H.R. 3347, *supra* note 8, § 3192(d)(1); H.R. 2643, *supra* note 8, § 3192(d)(1); H.R. 6046, *supra* note 5, § 3192(d)(1); H.R. 5227, *supra* note 2, § 3192(d). H.R. 3347 provides that the "warrant shall be issued, executed, and returned in the manner prescribed for the issuance, execution, and return of a warrant or summons, as the case may be, under the Federal Rules of Criminal Procedure." H.R. 3347, *supra* note 8, § 3192(d)(1) (emphasis added).

¹³⁷Current legislation provides only for the issuance of an arrest warrant. See 18 U.S.C. § 3184 (1976).

¹³⁸Such discretion can be inferred from the language of both versions of the Act, which provide for the issuance of a summons "if the Attorney General so requests." S. 220, *supra* note 7, § 3192(c); S. 1940, *supra* note 5, § 3192(c); S. 1639, *supra* note 1, § 3192(c); H.R. 3347, *supra* note 8, § 3192(d)(1); H.R. 2643, *supra* note 8, § 3192(d)(1); H.R. 6046, *supra* note 5, § 3192(d)(1); H.R. 5227, *supra* note 2, § 3192(d).

only if the applicable extradition treaty provides for it;¹³⁹ under the new Act such authority is also statutorily derived.¹⁴⁰ Consequently under the Act, a person could be provisionally arrested even if the applicable treaty does not specifically permit it. Because many of the more recent extradition treaties provide for provisional arrest, however, this subsection is not a major reform of existing practice. Nevertheless, it does provide both a legislative basis for the practice and limits thereto of sixty days with subsequent extensions of fifteen days each upon a showing of good cause.¹⁴¹ The constitutionality of this provision in the absence of probable cause is very questionable.¹⁴²

The Senate version provides that the procedures for issuing an arrest warrant are those set forth in Rule 4(d) of the Federal Rules of Criminal Procedure,¹⁴³ even though the federal rules of criminal procedure do not other-

¹³⁹18 U.S.C. § 3184 (1976). See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. IX, § 2, pp. 28-37. See also, e.g., Extradition Treaty, United States-Canada, entered into force March 22, 1976, 27 U.S.T. 983, T.I.A.S. No. 8237, art. 11. Both the Senate and House Judiciary Reports noted that the provision is a codification of existing practice. See Senate Judiciary Report on S. 1940, *supra* note 15, at 7-8; House Judiciary Report on H.R. 6046, *supra* note 23, at 9-10.

¹⁴⁰See S. 220, *supra* note 7, § 3192(d); S. 1940, *supra* note 5, § 3192(d); S. 1639, *supra* note 1, § 3192(d); H.R. 3347, *supra* note 8, § 3192(d); H.R. 2643, *supra* note 8, § 3192(d); H.R. 6046, *supra* note 5, § 3192(d); H.R. 5227, *supra* note 2, § 3192(d).

¹⁴¹See S. 220, *supra* note 7, § 3192(d)(2); S. 1940, *supra* note 5, § 3192(d)(2); S. 1639, *supra* note 1, § 3192(d)(2); H.R. 3347, *supra* note 8, § 3192(3); H.R. 2643, *supra* note 8, § 3192(e); H.R. 6046, *supra* note 5, § 3192(e); H.R. 5227, *supra* note 2, § 3192(e).

¹⁴²See *Caltagirone v. Grant*, 629 F.2d 739 (2d Cir. 1980).

¹⁴³FED. R. CRIM. P. 4 states:

Arrest Warrant or Summons Upon Complaint

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) Warrant. The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(d) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate

wise apply to extradition save for some specific exceptions discussed contextually below. Thus, the application of this rule is limited to the execution and return of arrest warrants and summons. The House version provides only that the Federal Rules of Criminal Procedure are applicable.¹⁴⁴

Both the Senate and House bills state that upon arrest the relator must be brought without unnecessary delay to the nearest available federal district court.¹⁴⁵ Availability is based on geographic proximity rather than jurisdictional competence, since both bills permit the government to select a district court other than the one having jurisdictional competence.¹⁴⁶ This rule is analogous to Rule 5 of the Federal Rules of Criminal Procedure.¹⁴⁷ However, there is

or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

¹⁴⁴The House Judiciary Committee justified this lack of specificity on the grounds that future amendments to the Rules might change the numerical designation of the rule regarding arrests. The Committee noted, however, that Rule 4(d) is currently applicable to this subsection. See House Judiciary Report on H.R. 6046, *supra* note 23, at 10.

¹⁴⁵S. 220, *supra* note 7, § 3192(c); S. 1940, *supra* note 5, § 3192(c); S. 1639, *supra* note 1, § 3192(c); H.R. 3347, *supra* note 8, § 3192(d)(1); H.R. 2643, *supra* note 8, § 3192(d)(1); H.R. 6046, *supra* note 5, § 3192(d)(1); H.R. 5227, *supra* note 2, § 3192(d).

¹⁴⁶See *supra* note 113 and accompanying text.

¹⁴⁷FED. R. CRIM. P. 5 states:

Initial Appearance Before the Magistrate

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Misdemeanors. If the charge against the defendant is a misdemeanor triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.

(c) Offenses Not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed

no indication as to whether or not a failure to bring the arrested person without unnecessary delay before the nearest federal district court judge or magistrate would result in any invalidity of a confession or inadmissibility of evidence obtained from the arrested person during this period.¹⁴⁸

XIII. ARREST AND RELEASE ON BAIL

Arrest and release on bail are two of the most important and difficult areas of extradition law and practice. While probable cause is required for an arrest

in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

In addition, Rule 5.1 provides:

Preliminary Examination

(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(c) Records. After concluding the preliminary examination the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not repay costs nor furnish security therefor.

The analogy to Rule 5 was specifically recognized by the Senate and House Judiciary Committees. See Senate Judiciary Report on S. 1940, *supra* note 15, at 8; House Judiciary Report on H.R. 6046, *supra* note 23, at 16.

¹⁴⁸See *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943); FED. R. CRIM. P. 5. Title II of the Omnibus Crime Control Act and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1976), purports to repeal the *McNabb-Mallory* rule; in light of *Miranda v. Arizona*, 384 U.S. 436 (1966), however, the constitutional effect of this repeal is questionable.

The Senate Judiciary Report noted that this subsection "is not intended to require the dismissal of the extradition proceedings solely on the ground that the fugitive arrested for extradition was taken without unnecessary delay before a judge or magistrate later determined not to be the 'nearest' one." Senate Judiciary Report on S. 1940, *supra* note 15, at 8.

by virtue of the fourth amendment,¹⁴⁹ release on bail is controversial because the sixth amendment has not been held applicable to extradition proceedings, although a qualified right to bail exists.¹⁵⁰

The government's request for an arrest warrant must specify the offense for which extradition is sought, and be accompanied by a copy of the request for extradition and the evidence and documents required by the applicable treaty.¹⁵¹ The Act on its face does not require probable cause in regard to the issuance of an arrest warrant before an extradition hearing. However, this does not affect the constitutional requirement of probable cause under the fourth amendment. As a matter of statutory interpretation, it is well established that when a statute is ambiguous, "construction should go in the direction of constitutional policy."¹⁵² Therefore, the Act should be interpreted as requiring a showing of probable cause in order for an arrest warrant to issue. The broad language of the fourth amendment, that "no Warrants shall issue, but upon probable cause,"¹⁵³ includes warrants for arrest for purposes of extradition. Although extradition is a form of international judicial assistance, it is still subject to United States constitutional provisions.¹⁵⁴ For a given aspect of legal proceedings, no matter of what nature, to touch upon the foreign relations of the United States is not a sufficient basis upon which to displace basic constitutional guarantees.

Because of the fourth amendment the government acting on behalf of a state requesting extradition would have to present to the magistrate issuing an arrest warrant allegations of "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense,' "¹⁵⁵ before a warrant could be issued. Since the "simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of

¹⁴⁹Probable cause for arrest in an extradition proceeding is required according to the statement in *Collins v. Loisel*, 259 U.S. 309 (1922), that the magistrate is to determine whether or not there is "competent legal evidence which, according to the law of [the state wherein the relator is found], would justify his apprehension and commitment for trial if the crime had been committed in that [s]tate." *Id.* at 315 (emphasis added).

¹⁵⁰*Caltagirone v. Grant*, 629 F.2d at 742. See *Valencia v. Limbs*, 655 F.2d 195, 196 (9th Cir. 1981); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 915 (2d Cir. 1981) cert. denied, 454 U.S. 971 (1981) *Antunes v. Vance*, 640 F.2d 3, 4 (4th Cir. 1981); *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976).

¹⁵¹S. 220, *supra* note 7, § 3192(b)(1); S. 1940, *supra* note 5, § 3192(b)(1); S. 1639, *supra* note 1, § 3192(b)(1); H.R. 3347, *supra* note 8, § 3192(b)(2), (b)(4)(B); H.R. 2643, *supra* note 8, § 3192(b)(2), (b)(4)(B); H.R. 6046, *supra* note 5, § 3192(b)(2), (b)(4)(A); H.R. 5227, *supra* note 2, § 3192(b)(2), (b)(4)(A).

¹⁵²*United States v. Johnson*, 323 U.S. 273, 276 (1944); quoted in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974).

¹⁵³In full, the fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. IV.

¹⁵⁴See 28 U.S.C. § 1782(a) (1976), which states: "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

¹⁵⁵*Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

probable cause,"¹⁵⁶ the issuance of arrest warrants for extradition hearings must follow these constitutional standards. Furthermore, the applicability of constitutional standards to extradition arrest procedures would include the well-known "four-corners rule" that in passing upon the validity of a warrant a reviewing court may consider only information brought to the magistrate's attention.¹⁵⁷ Therefore, additional information possessed by the United States government which is not communicated to the magistrate in its request for an arrest warrant may be excluded from subsequent considerations on constitutional grounds.¹⁵⁸ Should the courts construe the Act to not require a showing of probable cause before an arrest warrant is issued, then this portion of the Act would be held unconstitutional. With respect to non-United States citizens, the absence of a probable cause requirement cannot be justified on the basis of the diminished protections afforded aliens, since they may raise fourth amendment claims.¹⁵⁹ Furthermore, since both citizens and aliens are extraditable under the Act,¹⁶⁰ the equal protection clause of the fifth amendment applies.

The paradox in this area is that should it be held that the fourth amendment requires that probable cause exist before a person is arrested and brought into custody for an extradition hearing, then the warrant procedures set out in the Act are no longer required at all times, since it is well established that a warrantless arrest is not invalid as long as the officers had probable cause at the time of arrest.¹⁶¹ Furthermore, the necessity of an initial, before-arrest showing of probable cause is particularly acute in the extradition area because of the peculiarities of release on bail available to relators.¹⁶²

The Act does not distinguish between provisional arrest and other arrests insofar as the required standards of probable cause for arrest, although the fourth amendment requires it in both cases. Presumably the same standards will apply although clearly provisional arrests which are ostensibly based on grounds of emergency may not allow the government to produce the type of

¹⁵⁶*Spinelli v. United States*, 393 U.S. 410, 418 (1969), *rev'd sub nom.*, *Illinois v. Gates*, 103 S. Ct. 2317 (1983) *reh'g. den.*, 104 S. Ct. 33 (1983).

¹⁵⁷*Id.* at 413 n.3; *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964). Of course, the probable cause standard for arrest warrants is the same as for search warrants. *Aguilar*, 378 U.S. at 112 n.3.

¹⁵⁸Other questions raised by the incorporation of fourth amendment probable cause in extradition arrest procedures are considered in relation to the showing of probable cause to extradite. *See infra* notes 269-92 and accompanying text.

¹⁵⁹*United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974) (alien may challenge legality of wiretap on fourth amendment grounds); *Au Yi Lau v. Immigration and Naturalization Service*, 445 F.2d 217, 223 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971) (in deportation proceeding, alien may challenge legality of arrest on fourth amendment grounds).

¹⁶⁰*See* S. 220, *supra* note 7, § 3196(a); S. 1940, *supra* note 5, § 3196(a); S. 1639, *supra* note 1, § 3196(a); H.R. 3347, *supra* note 8, § 3196(a); H.R. 2643, *supra* note 8, § 3196(a); H.R. 6046, *supra* note 5, § 3196(a); H.R. 5227, *supra* note 7, § 3196(a).

¹⁶¹*United States v. Watson*, 423 U.S. 411, 423-24 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). Of course, warrants to enter the relator's home, or the home of another, are still necessary. *See generally* *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980).

¹⁶²For example, in *Caltagirone v. Grant*, 629 F.2d 739, the court noted that the relator had been held, without probable cause that he had committed any crime, 97 days from his arrest until the Second Circuit acted. *Id.* at 749.

probable cause that would otherwise be required for an arrest.¹⁶³ In other words, some type of probable cause is still required for a provisional arrest irrespective of the applicable treaty,¹⁶⁴ but no standards therefore are established in the Act. Clearly, the purpose of provisional arrest is to avoid flight before the filing of a complaint and the issuance of an arrest warrant. If the Attorney General files or intends to file a motion for issuance of summons the emergency basis justifying a provisional arrest could be challengeable.

With respects to standards of probable cause for provisional arrests and arrest warrants, the Act does not specifically change existing jurisprudence which requires for arrest warrants the same type of probable cause required for any other arrests in criminal cases which are included in the protection of the fourth amendment.¹⁶⁵ The same applies to provisional arrests, although the tests applied are different because of the emergency and temporary nature of the arrest.¹⁶⁶ However, it must be noted that in the absence of a fair bail provision, a sixty day period of provisional arrest provided for in the Act¹⁶⁷ without adequate probable cause is unconscionable.¹⁶⁸

Release of persons who are subject to a provisional arrest or arrest warrant has been the subject of controversy in existing jurisprudence which does not recognize a constitutional right to bail but provides for bail whenever the relator can show "special circumstances."¹⁶⁹ The House version provides for an elaborate scheme for bail which rejects the verbatim incorporation of the Bail Reform Act,¹⁷⁰ but nevertheless sets forth substantially similar criteria against the

¹⁶³See *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980).

¹⁶⁴See *Caltagirone v. Grant*, 629 F.2d 739.

¹⁶⁵*Caltagirone v. Grant*, 629 F.2d at 742. See *Valencia v. Limbs*, 655 F.2d at 196; *Hu Yau-Leung v. Soscia*, 649 F.2d at 915; *Antunes v. Vance*, 640 F.2d at 4; *Greci v. Birknes*, 527 F.2d 956. Probable cause for arrest is required according to the statement in *Collins v. Loisel*, 259 U.S. 309, that the magistrate is to determine whether or not there is "competent legal evidence which, according to the law of [the state wherein the relator is found], would justify his *apprehension* and commitment for trial if the crime had been committed in that state." *Id.* at 315 (emphasis added).

¹⁶⁶See *Caltagirone v. Grant*, 629 F.2d 739.

¹⁶⁷See S. 220, *supra* note 7, § 3192(d)(2); S. 1940, *supra* note 5, § 3192(d)(2); S. 1639, *supra* note 1, § 3192(d)(2); H.R. 3347, *supra* note 8, § 3192(e); H.R. 2643, *supra* note, 8, § 3192(e); H.R. 6046, *supra* note 5, § 3192(e); H.R. 5227, *supra* note 2, § 3192(e).

¹⁶⁸Such a provision would allow an individual to be held upon merely a telex from the requesting state containing the unsupported assertion that the individual has been charged, prosecuted, or sentenced for a criminal offense. In light of *Caltagirone*, 629 F.2d 739, this provision would likely be unconstitutional. This writer made similar observations before the Senate and House Judiciary Committees on their respective proposed bills. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 22; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 98, 103.

¹⁶⁹See *Wright v. Henkel*, 190 U.S. 40 (1903). See also *Hu Yau-Leung v. Soscia*, 649 F.2d 914 (youthfulness of relator and lack of appropriate detention facility sufficiently "special"); *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979) (per curiam) (that relator's brother was released on bail pending extradition on same crime not sufficiently "special"); *Beaulieu v. Hartigan*, 554 F.2d 1 (1st Cir. 1977) (per curiam) (no "special" circumstances shown); *In re Klein*, 46 F.2d 85 (S.D.N.Y. 1930) (discomfort of confinement not a "special circumstance").

¹⁷⁰18 U.S.C. §§ 3041, 3141-43, 3146-52, 3568 (1976).

inexplicably strong opposition of the Administration.¹⁷¹ In addition, the House version allocates different burdens of proof to the relator and the government depending upon a certain time schedule, particularly with respect to provisional arrests. Under the House bill, a relator has the burden of showing eligibility for release on bail after his provisional arrest. The burden is on the relator for ten days to show his eligibility by a preponderance of evidence. Thereafter, the burden shifts to the government to show that the relator should not be free pending the extradition hearing.¹⁷² The relator can satisfy his burden of proof during the ten-day period by showing, by a preponderance of the evidence, that his release will not present a substantial risk of flight, that if released he will not be a danger to another person or to the community, and that his release will not jeopardize a United States treaty obligation.¹⁷³ At the end of the initial ten-day period following arrest, the House bill overturns the existing jurisprudence, places the burden of proof on the government, and specifies the factors that a magistrate is to consider in determining eligibility for, and the conditions of, release pending the extradition hearing.¹⁷⁴ Having done away

¹⁷¹See House Judiciary Report on H. R. 6046, *supra* note 23, at 10-11; House Foreign Affairs Report on H.R. 6046, *supra* note 27, at 2-3. The Departments of State and Justice proposed amendments to H.R. 6046 to reinstate a "special circumstances" requirement for bail rather than criteria enumerated in the bill. *Id.* at 3-5 (Congressman Hughes' response in support of enumerated criteria).

¹⁷²H.R. 3347, *supra* note 8, § 3192(d); H.R. 2643, *supra* note 8, § 3192(d)(2); H.R. 6046, *supra* note 5, § 3192(d)(2); H.R. 5227, *supra* note 2, § 3192(d)(2). Upon a showing of "good cause" by the government, the proposed legislation permits the extension of this ten-day period for successive five-day periods. H.R. 2643, *supra* note 8, § 3192(d)(3); H.R. 6046, *supra* note 5, § 3192(d)(3); H.R. 5227, *supra* note 2, § 3192(d)(2). H.R. 3347 provides for extensions of ten days, rather than five. H.R. 3347, *supra* note 8, § 3192(d)(3). Thus, during provisional arrest for the first ten days the burden of proof is on the relator by a preponderance of the evidence. For the subsequent extensions, it is on the government by a showing of good cause. For release after an arrest warrant has been served, the burden of proof is on the relator by a preponderance of the evidence. For release on appeal, it is the same.

¹⁷³H.R. 2643, *supra* note 8, § 3192(d)(2); H.R. 6046, *supra* note 5, § 3192(d)(2); H.R. 5227, *supra* note 1, § 3198(c)(2). Under H.R. 3347, the relator is not obligated to show that his release will not jeopardize a treaty obligation of the United States. Instead, this is one factor which the court must take into account in reaching a determination of the relator's release. See H.R. 3347, *supra* note 8, § 3192(d)(2), (d)(4).

¹⁷⁴The House bills provide for the following criteria and conditions:

(c)(1) A person arrested or otherwise held or detained under this chapter shall to the extent practicable, be confined in a place other than one used for the confinement of persons convicted of crime. A person arrested or otherwise held or detained in connection with any proceeding under this chapter shall be treated in accordance with this subsection and chapter 207 of this title, except sections 3141, 3144, 3146(a), 3146(b), 3148, and 3150. H.R. 3347 contains identical language, but deletes the requirement that the court deny release if it determines that this will not "carry out the obligations of the United States under the applicable treaty concerning extradition" in subsections (c)(2) and (c)(3), see H.R. 3347, *supra* note 8, § 3192(f)(1), and instead provides that in determining the conditions of release which will give the required assurances, the court take into account "whether the release of such person would jeopardize a relationship with a foreign state with respect to a treaty concerning extradition." H.R. 3347, *supra* note 8, § 3192(d)(2)(J). Proceedings under this chapter shall be deemed criminal proceedings for the purposes of this application of chapter 207 of this title and the release of a person under this subsection shall be deemed to a release under second 3146(a) for the purposes of such application.

(2) Any person arrested or otherwise held or detained in connection with any proceeding under this chapter shall, at such person's appearance before a judicial officer, be ordered and released pending a proceeding under this chapter on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines that at a hearing the Government has shown by the preponderance of the evidence that such a release will not assure the appearance of the person as required, assure the safety of another person or the community, or carry out the obligations of the United States under the applicable treaty concerning extradition. If the judicial officer so determines, the judicial officer may, either

with the presumption against release prior to the hearing, the House bill, consistent with existing legislation, reinstates the rule concerning a relator's appeal of a determination of eligibility to bail. Thus, bail is available to a relator-appellant only if he makes the evidentiary showing required during the initial ten-day period, and additionally shows that he has a "great" chance of success on appeal.¹⁷⁵

Under existing jurisprudence, there is a strong constitutional policy, based upon the eighth amendment's prohibition against excessive bail,¹⁷⁶ in favor of

in lieu of or in addition to such methods of release, order such person detained after a hearing on a motion for detention or impose any of or any combination of the following conditions of release which will give the required assurances and carry out such obligations:

(A) Place the accused person in the custody of a designated person or organization agreeing to supervise such accused person.

(B) Place restrictions on the travel, association, or place of abode of the person during the period of release.

(C) Require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release.

(D) Require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

(E) Impose any other conditions deemed reasonably necessary to give the required assurances and carry out such obligations, including a condition requiring that the person return to custody after specified hours.

(3) In determining which conditions of release will give the required assurances and carry out the obligations of the United States as required, the judicial officer shall, on the basis of available information, take into account —

(A) the nature and circumstances of the offense charged, and the weight of the evidence against the person accused;

(B) such person's family and local ties, financial resources, character, and mental conditions;

(C) the length of such person's residence in the community;

(D) such person's record of convictions;

(E) such person's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings;

(F) whether such person is employed or is attending an educational institution;

(G) whether such person is lawfully within the United States;

(H) the existence of any other requests for the extradition of such person other than the one with respect to which release is sought; and

(I) whether such a person is currently on probation, parole, or mandatory release under State or Federal law.

H.R. 2643, *supra* note 8, § 3199(c)(1)-(3); H.R. 6046, *supra* note 5, § 3199(c)(1)-(3). These detailed criteria and conditions were not included in the original House bill, which contained only a general statement regarding bail. See H.R. 5227, *supra* note 2, § 3198(c)(2).

¹⁷⁵H.R. 3347, *supra* note 8, § 3195(a)(3)(A); H.R. 2643, *supra* note 8, § 3195(a)(3)(A); H.R. 6046, *supra* note 5, § 3195(a)(3)(A); H.R. 5227, *supra* note 2, § 3195(a)(3)(A). Under domestic law, a defendant appealing a conviction is denied release on bail if it appears that there is a risk of flight, a risk of danger to others, or if "it appears that an appeal is frivolous or taken for delay." 18 U.S.C. § 3148 (1976). The burden of proving or negating these factors is not allocated by the statute. However, according to FED. R. APP. P. 9(c), the burden is placed upon the defendant. See *United States v. Provenzano*, 605 F.2d 85, 94-95 (3d Cir. 1979), which discusses, but accepts, this allocation of the burden of proof which seems clearly contrary to the congressional intent behind the Bail Reform Act to place the burden of proof upon the government to demonstrate that release should not be granted.

¹⁷⁶The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed." U.S. CONST., amend. VIII.

a person's release until his case is finally determined.¹⁷⁷ The explicit recognition of the right to bail pending the extradition hearing is, as far as it goes, consistent with this constitutional policy and the Bail Reform Act, although the latter is not incorporated per se in the House bill provisions on bail. Nevertheless, the degree of similarity between the House bill provisions regarding bail after the initial ten-day period and the Bail Reform Act provisions is so substantial that it supports the conclusion that the jurisprudence of the Bail Reform Act may be held applicable to these similar provisions of the House bill.¹⁷⁸

The legislative history of the House bill indicates that the placement of the burden of proof on the relator during the ten days after his arrest was thought to be justified because the United States is frequently asked by foreign states to arrest certain persons provisionally and hold them until the necessary background information is provided. Under these circumstances, without any background information, the United States would be unable immediately after the arrest to show the inappropriateness of release on bail.¹⁷⁹ The House version also grants release on bail pending appeal and places the burden of showing eligibility on the relator.¹⁸⁰ Unfortunately, among these is a provision re-

¹⁷⁷*Bandy v. United States*, 82 S. Ct. 11, 12 (Douglas, Circuit Justice 1961); *Fernandez v. United States*, 81 S. Ct. 642, 645 (Harlan, Circuit Justice 1961); *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981); *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981). See also *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) ("[B]ail . . . is basic to our system of law"); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (the "traditional right" to bail "serves to prevent infliction of punishment prior to conviction").

¹⁷⁸This conclusion is warranted in spite of the fact that the House Judiciary Committee ostensibly rejected the per se incorporation of the Bail Reform Act. See House Judiciary Report on H.R. 6046, *supra* note 23, at 5. First, in spite of the House bill's statement that 18 U.S.C. §§ 3141, 3144, 3146(a), (b), 3148 and 3150 (i.e., provisions of the Bail Reform Act) do not per se apply although all other sections of Chapter 207 do per se apply (including other sections of the Bail Reform Act), see H.R. 3347, *supra* note 8, § 3192(f)(1); H.R. 2643, *supra* note 8, § 3199(c)(1); H.R. 6046, *supra* note 5, § 3199(c)(1), the bill nevertheless goes on to provide that "the release of a person under this subsection shall be deemed a release under section 3146(a) . . ." See H.R. 3347, *supra* note 8, § 3192(f)(1); H.R. 2643, *supra* note 8, § 3199(c)(1); H.R. 6046, *supra* note 5, § 3199(c)(1). 18 U.S.C. § 3146(a) is a major provision of the Bail Reform Act setting forth conditions of release which the court may impose. Second, the language of this section of the Bail Reform Act and 18 U.S.C. § 3146(b), also from the Bail Reform Act which sets forth criteria the court is to use in setting conditions of release, are virtually identical to the corollary provisions of the House bill.

In further support of the conclusion that the House version intends the applicability of the jurisprudential interpretations of the Bail Reform Act in spite of the bill's ostensible rejection of certain provisions of the Act per se, the following should also be noted: (1) There was no need to incorporate the applicability of 18 U.S.C. § 3141 into extradition proceedings since this section establishes the general power of courts and magistrates to release persons on bail, and such authority in extradition proceedings is explicitly stated in the House bill at § 3199(c)(1); (2) There was no need to incorporate the applicability of 18 U.S.C. § 3144 into extradition proceedings since this section establishes the power of courts and magistrates to impose additional bail if it appears that bail is insufficient to prevent the person from fleeing the jurisdiction, and such authority in extradition proceedings is provided for in the House bill in § 3199(c)(7); (3) There was no need to incorporate the applicability of 18 U.S.C. § 3148 regarding release in capital cases or after conviction into extradition proceedings since neither of these kinds of situations arises in an extradition proceeding; (4) There was no need to incorporate the applicability of 18 U.S.C. § 3150 regarding penalties for failure to appear into extradition proceedings since this provision allocates the penalties according to distinctions as to charge, conviction, etc., that are not readily applicable to extradition proceedings.

¹⁷⁹See House Judiciary Report on H.R. 6046, *supra* note 23, at 11.

¹⁸⁰H.R. 3347, *supra* note 8, § 3195(a)(3); H.R. 2643, *supra* note 8, § 3195(a)(3); H.R. 6046, *supra* note 5, § 3195(a)(3).

quiring a showing that such release would not jeopardize extradition relations with another state.¹⁸¹ This provision introduces an unconscionable political dimension into the processes of criminal justice which courts are ill equipped to assess. If a relator were to challenge the constitutionality of the bail provisions under the House bill, the federal courts would have to weigh the importance of these governmental interests.¹⁸²

The Senate version continues existing practice of allowing bail only for special circumstances which the relator must prove.¹⁸³ Though it does not specifically provide for bail during the sixty days of potential provisional arrest, presumably the special circumstances standards apply.¹⁸⁴ The same standards apply to bail pending appeal.¹⁸⁵

Neither the Senate nor the House versions refer to discovery by the relator, and it is presumed that the existing limited practice of discovery will continue to apply.¹⁸⁶

XIV. WAIVER OF HEARING

The Senate and House bills contain similar sections regarding waiver, under section 3193. It is a novel procedure whereby a relator may waive a hearing on extradition and any and all requirements under the treaty or the legislation. This requirement is imposed in order to avoid allowing the relator to waive some of the charges and not others and therefore to benefit selectively from the rule of specialty.¹⁸⁷ This would obligate the requesting state to prosecute him only for the crime or crimes for which the order predicated on the waiver was actually issued, thus precluding prosecution or punishment for any other crime, even one that was part of the extradition request but which was not the object of the waiver.

¹⁸¹H.R. 2643, *supra* note 8, § 3195(a)(3)(A)(III); H.R. 6046, *supra* note 5, § 3195(a)(3)(A)(III). H.R. 3347 deletes this requirement, and instead provides that the court is to consider this factor in determining whether the relator should be released pending appeal. See H.R. 3347, *supra* note 8, § 3192(a)(4).

¹⁸²Such a challenge would first require a reconsideration of the rationale of *Wright v. Henkel*, 190 U.S. 40 (1903). Given the increased general availability of international travel created by jet airplanes, it no longer seems reasonable to assume that persons suspected of having committed crimes in foreign countries are more likely to flee the United States than persons suspected of having committed crimes within the United States. A challenge to bail procedure on appeal would entail a challenge to the domestic procedure as well. Although FED. R. APP. P. 9(c) has been rather ably criticized by one commentator (see Note, *Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach*, 57 TEX. L. REV. 275 (1979)) it has been accepted by the courts. See *United States v. Provenzano*, 605 F.2d 85, 95 n.50 (3d Cir. 1979).

¹⁸³S. 220, *supra* note 7, § 3192(d)(1); S. 1940, *supra* note 5, § 3192(d)(1); S. 1639, *supra* note 1, § 3192(d)(1).

¹⁸⁴See *Caltagirone v. Grant*, 629 F.2d 739; *Wright v. Henkel*, 190 U.S. 40.

¹⁸⁵See S. 220, *supra* note 7, § 3195(b)(1); S. 1940, *supra* note 5, § 3195(b)(1); S. 1639, *supra* note 1, § 3195(b)(1).

¹⁸⁶See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. IX, § 4.

¹⁸⁷See House Judiciary Report on H.R. 6046, *supra* note 23, at 12. The rule of specialty stands for the proposition that the requesting state which secures the surrender of a person can prosecute that person only for the offense for which he or she was surrendered by the requested state or else allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered.

The Senate version states that the waiver is irrevocable.¹⁸⁸ The House version, however, allows for revocation when there is an "extraordinary change of circumstances."¹⁸⁹ Presumably this would include instances such as a change in government in the requesting state or the discovery of evidence indicating that the relator would not receive a fair trial in the requesting state. The court can make such a determination in the best interests of justice, which allows it enough latitude to use the analogy of withdrawal of guilty pleas in federal criminal cases.¹⁹⁰

Both versions state that the waiver must be with full knowledge of its legal consequences and with advice of counsel, whether retained by the relator or appointed in case of indigency.¹⁹¹ Although the section requires the court to inform the relator of his rights under the legislation and the implications of his waiver,¹⁹² it does not state what sanction will apply in the event the court fails to do so. Presumably failure to do so would be grounds for revocation of the waiver and vacation of an order based thereon, but that is left to future jurisprudential determination.¹⁹³

¹⁸⁸S. 220, S. 1940, and S. 1639 state that, "[T]he court, upon being informed of the person's consent to removal, shall . . . address the person to determine whether his consent is . . . given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it." S. 220, *supra* note 7, § 3193(b)(2)(B); S. 1940, *supra* note 5, § 3193(b)(2)(B); S. 1639, *supra* note 1, § 3193(b)(2)(B).

¹⁸⁹H.R. 3347, *supra* note 8, § 3193(a); H.R. 2643, *supra* note 8, § 3193(a); H.R. 6046, *supra* note 5, § 3193(a); H.R. 5227, *supra* note 2, § 3193(a).

¹⁹⁰See House Judiciary Report on H.R. 6046, *supra* note 23, at 13.

¹⁹¹S. 220, *supra* note 7, § 3193(b)(1); S. 1940, *supra* note 5, § 3193(b)(1); S. 1639, *supra* note 1, § 3193(b)(1); H.R. 3347, *supra* note 8, § 3193(b)(1); H.R. 2643, *supra* note 8, § 3193(b)(1); H.R. 6046, *supra* note 5, § 3193(b)(1); H.R. 5227, *supra* note 2, § 3193(b)(1).

¹⁹²S. 220, S. 1940, and S. 1639 require that:

[t]he court, upon being informed of the person's consent to removal, shall —

(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and

(2) address the person to determine whether his consent is —

(A) voluntary, and not the result of a threat or other improper inducement; and

(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

S. 220, *supra* note 7, § 3193(b); S. 1940, *supra* note 5, § 3193(b); S. 1639, *supra* note 1, § 3193(b). H.R. 2643, H.R. 6046, and H.R. 5227 contain a similar requirement, by providing that:

[t]he court shall —

(1) inform a person making a waiver under this section of such person's right to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel; and

(2) inquire of such person and determine whether such waiver is —

(A) voluntary and not the result of threat or other improper inducement; and

(B) given with full knowledge of its legal consequences.

H.R. 3347, *supra* note 8, § 3193(b); H.R. 2643, *supra* note 8, § 3193(b); H.R. 6046, *supra* note 5, § 3193(b); H.R. 5227, *supra* note 2, § 3193(b).

¹⁹³Neither the Senate nor the House Judiciary Report addresses this issue. See Senate Judiciary Report on S. 1940, *supra* note 15, at 10-11; House Judiciary Report on H.R. 6046, *supra* note 23, at 12-13. The Senate Report merely notes that the provision was included to be consistent with 18 U.S.C. §§ 4107-08 (1976) regarding "a prisoner's voluntary consent to transfer to his country of nationality under treaties on the execution of penal sanctions." Senate Judiciary Report on S. 1940, *supra* note 15, at 10. The House Report notes that the requirements that the consent be voluntary with knowledge of its legal consequences is derived from domestic law regarding acceptance of guilty pleas. House Judiciary Report on H.R. 6046, *supra* note 23, at 13. It would seem to follow, therefore, that the same sanction would attach for failure to satisfy these requirements — i.e., revocation of the consent and vacation of the order.

The Act implicitly requires that a relator consent to a waiver after he has informed the court of his willingness to consent and has been advised by the court of the charges against him for which his extradition was requested. Specific language should have been included, however, in order to ensure that a relator's consent is made with full knowledge of the charges against him and that the court record reflects the charges for which the individual was extradited.¹⁹⁴ This latter guarantee would have preserved the rule of specialty,¹⁹⁵ and could have been accomplished through the insertion of explicit language in the Act that waiver of the extradition hearing is linked to the rule such that the relator, upon return, can be prosecuted in the requesting state only for the offense for which the extradition hearing was waived. It is important to bear in mind that the rule benefits not only the relator but also the United States government by ensuring that its processes have not been used for a purpose other than the one specified in the treaty. Theoretically the United States government can waive the rule without the need for a judicial hearing, provided the requesting state has probable cause for other offenses and is not seeking to prosecute the relator for political, racial, religious, or ethnic reasons.¹⁹⁶ The Act does not alter existing jurisprudence and governmental practice on this subject.¹⁹⁷

The Senate and House versions fail to provide for bail when the relator has waived his right to the extradition hearing. The Senate bill provides no guidelines for a relator's release pending surrender.¹⁹⁸ The House version provides standards for bail only in section 3199, the final section in the bill.¹⁹⁹ There is no specific provision for bail when the relator has waived the extradition proceeding.²⁰⁰

The Senate version provides specific time limitations on detention in its section regarding waiver.²⁰¹ It requires that the relator be removed within thirty

¹⁹⁴These observations were also made by this author at congressional hearings on the bills. See *Senate Judiciary Hearings on S. 1639*, *supra* note 23, at 20; *House Judiciary Hearings on H. R. 5227*, *supra* note 4, at 103; *House Foreign Relations Hearings on H.R. 6046*, *supra* note 27.

¹⁹⁵See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 6.

¹⁹⁶See *id.* These observations and suggestions were made by this writer at hearings on S. 1639, H.R. 5227, and H.R. 6046. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 20; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 99, 103; *House Foreign Relations Hearings on H.R. 6046*, *supra* note 27.

¹⁹⁷See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 6.

¹⁹⁸In fact, the Senate bill requires that "[t]he court shall order that the person be held in official detention until surrendered." S. 220, *supra* note 7, § 3193(c); S. 1940, *supra* note 5, § 3193(c); S. 1639, *supra* note 1, § 3195(c). The Senate Judiciary Report made no reference to whether a relator should be released pending delivery when he has waived the extradition hearing. See Senate Judiciary Report on S. 1940, *supra* note 15, at 10-11.

¹⁹⁹H.R. 2643, *supra* note 8, § 3199 (c); H.R. 6046, *supra* note 5, § 3199(c); H.R. 5227, *supra* note 2, § 3198(c). H.R. 3347, however, includes bail in its section regarding the complaint and preliminary proceedings. See H.R. 3347, *supra* note 8, § 3192(f).

²⁰⁰The House Judiciary Report made no reference to whether a relator should be released pending delivery when he has waived the extradition hearing. See House Judiciary Report on H.R. 6046, *supra* note 23, at 12-13.

²⁰¹The bill provides:

LIMITATION ON DETENTION PENDING REMOVAL —

A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any

days from the date of waiver. If not removed with this period, the relator may petition for release. The burden is placed upon the Attorney General to show good cause why the relator should not be released. The standard of "good cause" is not defined anywhere in the bill.²⁰² The House bill requires that the relator be removed within thirty days from the court's certification of the transcript.²⁰³ If not removed within this time limitation, the relator may petition the court for dismissal of the complaint against him and dissolution of the court's order of extraditability.²⁰⁴ As in the Senate bill, the House version permits the Attorney General to show good cause why the relator's petition should not be granted, and again, the standard of "good cause" is not defined.²⁰⁵

Both versions of the Act require that the Attorney General consent to the relator's waiver of the extradition hearing.²⁰⁶ The Senate Judiciary Committee noted that this requirement was included to prevent the relator from leaving the United States in order to avoid prosecution or punishment in this country. It also gives the requesting state the latitude to prosecute and punish the relator for all of the offenses specified in the complaint, thus preserving the rule of specialty,²⁰⁷ as noted in the Report of the House Judiciary Committee.²⁰⁸ The

time during which removal is delayed by judicial proceeding, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

S. 220, *supra* note 7, § 3193(d); S. 1940, *supra* note 5, § 3193(d); S. 1639, *supra* note 1, § 3193(d).

²⁰²No standard for "good cause" is provided in the Judiciary Committee's Report. See Senate Judiciary Report on S. 1940, *supra* note 15, at 10-11.

²⁰³This requirement is stated not in the section regarding waiver, but in the section regarding surrender of the relator after the hearing. In full, the subsection provides:

The court shall, upon petition after reasonable notice to the Secretary of State by a person ordered extraditable under this chapter, dismiss the complaint against the person and dissolve the order of extraditability if that person has not been removed from the United States by the end of thirty days after —

(1) surrender has been ordered by the Secretary of State in the case of a person ordered extraditable after a hearing under this section; or

(2) certification of transcript under section 3193 of this title in the case of a person making waiver under such section;

unless the Attorney General shows good cause why such petition should not be granted.

H.R. 6046, *supra* note 5, § 3196(c); H.R. 3347, *supra* note 8, § 3196(c); H.R. 2643, *supra* note 8, § 3196(c). The original House bill contained no provision to limit the period of the relator's detention in the event he had waived the extradition hearing and consented to removal.

²⁰⁴*Id.*

²⁰⁵This is true in the Senate and House Judiciary Committees' Report on the bill as well. See Senate Judiciary Report on S. 1940, *supra* note 15, at 10-11; House Judiciary Report on H.R. 6046, *supra* note 23, at 12-13.

²⁰⁶S. 220, S. 1940, and S. 1639 state this requirement in subsection (c), which provides that the court, upon finding that the relator's "consent to removal is voluntary and given with full knowledge of its consequences, shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender" of the relator. S. 220, *supra* note 7, § 3193(c); S. 1940, *supra* note 5, § 3193(c); S. 1639, *supra* note 1, § 3193(c). H.R. 3347, H.R. 2643, H.R. 6046, and H.R. 5227 provide for this requirement in subsection (a), which states that the relator may waive the extradition hearing "with the consent of the Attorney General . . ." H.R. 3347, *supra* note 8, § 3193(a); H.R. 2643, *supra* note 8, § 3193(a); H.R. 6046, *supra* note 5, § 3193(a); H.R. 5227, *supra* note 2, § 3193(a).

²⁰⁷See *supra* note 187 and accompanying text.

²⁰⁸See House Judiciary Report on H.R. 6046, *supra* note 23, at 12.

Senate Report also states that the "Secretary of State does not have the discretionary authority to refuse to surrender a person who has waived the proceeding under this chapter."²⁰⁹ Thus, the relator's waiver of the extradition hearing is understood to be a bar to the Secretary of State's executive discretion to deny extradition. This is erroneous, since that discretion is inherent in the Constitution's separation of powers and not derivative from the legislature. Nothing in the Act, nor any of its drafts, refers to partial waiver by the relator. In practice this might well be the case, and presumably the government in consultation with the requesting state could stipulate to it with the relator.

Much like the guilty plea in criminal proceedings, the waiver procedure will provide an opportunity for negotiations prior to the formal entry of a waiver.²¹⁰ If a person sought for extradition waives a hearing and an appeal by right,²¹¹ it is common sense to expect that such a person will seek to obtain some *quid pro quo*; this is the opportunity for it, as it has been in criminal proceedings. However, in extradition it is difficult to see how the government can compromise the rights of the requesting state. It can, of course, amend the complaint and delete certain charges or reduce them, but this implies consent of the requesting state and that of the Secretary of State. It can be argued that once a request is made by a state all procedural aspects thereafter, including waiver, are subject to national law. If such law gives the Attorney General explicit or implicit discretion it cannot be subjected to the approval of the requesting state, except in cases of specific treaty requirement. Nevertheless, the prior consent of the Secretary of State should be obtained for two reasons: (1) it is a matter affecting foreign affairs for which the Secretary of State is accountable to the requesting state, and (2) under the rule of specialty the Secretary of State will have to enforce a court order which is based on something other than what the requesting state submitted its request for and he should be in a position to do so effectively by sharing in the original decision.

The waiver procedure is, however, intended to accelerate the processes of extradition²¹² and will very likely accomplish this, although it will also result in increased negotiations and plea bargains.

XV. EXTRADITION HEARING AND ORDER

Section 3194 of both the Senate and House bills provides for procedural and substantive aspects regarding the extradition hearing, evidence which can be presented by the Attorney General and the relator, defenses which the relator

²⁰⁹Senate Judiciary Report on S. 1940, *supra* note 15, at 10.

²¹⁰*See Santobello v. New York*, 404 U.S. 257 (1971); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) *reh'g denied* 435 U.S. 918 (1978). *See also* Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471 (1978). It is important in this context to also consider the role of the judge in this process. *See, e.g.,* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

²¹¹The provision regarding appeal, § 3195, is discussed *infra* at notes 339-74 and accompanying text.

²¹²*See* Senate Judiciary Report on S. 1940, *supra* note 15, at 10; House Judiciary Report on H.R. 6046, *supra* note 23, at 12.

may raise as a bar to extradition, the findings of the court, and the certification of the court's findings. It thus contains a mixture of substantive and procedural requirements and formalities.

A. The Hearing

Both the Senate and House bills structure the extradition hearing such that it is *sui generis*, partaking of both criminal and civil characteristics. Although the Federal Rules of Criminal Procedure and the Federal Rules of Evidence are not applicable per se in an extradition hearing,²¹³ all versions of the bill make specific reference to the applicability of these Rules²¹⁴ and implicitly incorporate the Rules on numerous occasions.²¹⁵ The characterization of extradition as a *sui generis* matter was developed by the courts primarily to fill legislative gaps caused by piecemeal amendments to the United States extradition laws between 1848 and 1968.²¹⁶ Although the Act is portrayed by its supporters as a "complete reform and revision" of United States law and practice,²¹⁷ it is in many respects a codification of current jurisprudence and practice in the extradition hearing.²¹⁸ However, it leaves many gaps, as indicated in this article. It is unfortunate that the "Act" continues the *sui generis* characterization of the extradition process developed by jurisprudence instead of giving it a more distinguishable procedural nature. In so doing, the "Act" missed an opportunity to dispel the ambiguity inherent in existing practice which is likely to pose problems in the court's interpretation of this section.

Both versions of the Act require that the court shall hold the extradition hearing as soon as practicable after the service of summons or arrest of the

²¹³See FED. R. CRIM. P. 54(b)(5); FED. R. EVID. 1101(d)(3).

²¹⁴See S. 220, *supra* note 7, § 3192(c); S. 1940, *supra* note 5, § 3192(c); S. 1639, *supra* note 1, § 3192(c) (applicability of FED. R. CRIM. P. 4(d) to arrest warrant standards); H.R. 3347, *supra* note 8, § 3192(d)(1); H.R. 2643, *supra* note 8, § 3192(d)(1); H.R. 6046, *supra* note 5, § 3192(d)(1); H.R. 5227, *supra* note 1, § 3192(d)(1) (applicability of Federal Rules of Criminal Procedure to arrest warrant standards); H.R. 3347, *supra* note 8, § 3194(g)(1)(B); H.R. 2643, *supra* note 8, § 3194(g)(1)(B); H.R. 6046, *supra* note 5, § 3194(g)(1)(B); H.R. 5227, *supra* note 1, § 3194(g)(1)(B) (applicability of Federal Rules of Evidence to admissibility of authenticated documents).

²¹⁵See Senate Judiciary Report on S. 1940, *supra* note 15, at 8 (FED. R. CRIM. P. 4(d) applicable to arrest warrants; FED. R. CRIM. P. 5 applicable to requirement that relator appear before court without unnecessary delay); *id.* at 17 n.6 (FED. R. CRIM. P. 5.1 applicable to determination of probable cause to extradite); *id.* at 16 (FED. R. EVID. 901(a) and 902(3) applicable to authentication of documents); House Judiciary Report on H.R. 6046, *supra* note 23, at 10 (FED. R. CRIM. P. 4(d) applicable to arrest warrants); *id.* at 16 (FED. R. CRIM. P. 5 applicable to requirement that relator appear before court without unnecessary delay); *id.* at 15 (Federal Rules of Evidence applicable to extradition hearings). See also Senate Judiciary Report on S. 1940, *supra* note 15, at 15 (relator's right to counsel analogized to 18 U.S.C. § 3401); *id.* at 18 (Federal Rules of Appellate Procedure applicable to appeal section); House Judiciary Report on H.R. 6046, *supra* note 23, at 13 (consent to waiver analogized to guilty pleas); *id.* at 16 (relator's right to counsel analogized to 18 U.S.C. § 4214); *id.* at 17 (federal probable cause for arrest standard applicable to extradition proceedings); *id.* at 28 (Federal Rules of Appellate Procedure applicable to appeal section).

²¹⁶See *supra* note 11 and accompanying text.

²¹⁷See Senate Judiciary Report on S. 1940, *supra* note 15, at 3-5; House Judiciary Report on H.R. 6046, *supra* note 23, at 2-5.

²¹⁸See, e.g., Senate Judiciary Report on S. 1940, *supra* note 15, at 11-13, 15-17; House Judiciary Report on H.R. 6046, *supra* note 23, at 13-20.

person requested.²¹⁹ The Senate bill states that the court is "to determine whether the person against whom a complaint is filed is extraditable as provided in subsection (d)," ²²⁰ while the House bill provides that the court is "to determine issues of law and fact with respect" to the complaint.²²¹ The Senate bill further specifically states that "[t]he purpose of the hearing is limited."²²² No such equivalent statement is included in the House bill. In addition, the Senate bill notes that

[t]he court does not have jurisdiction to determine —

(1) the merits of the charge against the person by the foreign state;

(2) whether the foreign state is seeking the extradition of the person for the purpose of prosecuting or punishing the person for his political opinions, race, religion, or nationality; or

(3) whether the extradition of the person to the foreign state seeking his return would be incompatible with humanitarian considerations.²²³

The House bill, however, simply states that "[t]he guilt or innocence of the person sought to be extradited . . . is not an issue before the court."²²⁴

The two versions of the Act also specify the rights of the relator at the extradition hearing. Both are virtually identical in their provision of the relator's right to representation by counsel, and the relator's right to court-appointed

²¹⁹S. 220, *supra* note 7, § 3194(a); S. 1940, *supra* note 5, § 3194(a); S. 1639, *supra* note 1, § 3194(a); H.R. 3347, *supra* note 8, § 3194(a); H.R. 2643, *supra* note 8, § 3194(a); H.R. 6046, *supra* note 5, § 3194(a); H.R. 5227, *supra* note 2, § 3194(a).

²²⁰S. 220, *supra* note 7, § 3194(a). S. 1940 and S. 1639 did not include the phrase "as provided in subsection (d)." See S. 1940, *supra* note 5, § 3194(a); S. 1639, *supra* note 1, § 3194(a).

²²¹H.R. 3347, *supra* note 8, § 3194(a); H.R. 2643, *supra* note 8, § 3194(a); H.R. 6046, *supra* note 5, § 3194(a); H.R. 5227, *supra* note 2, § 3194(a).

²²²S. 220, *supra* note 7, § 3194(a); S. 1940, *supra* note 5, § 3194(a); S. 1639, *supra* note 1, § 3194(a).

²²³S. 220, *supra* note 7, § 3194(a)(1)-(3). S. 1940 and S. 1639 stated that "[t]he court does not have jurisdiction to determine the merits of the charge," or whether the requesting state "is seeking the extradition of the person . . . for the purpose of prosecuting or punishing the person for his political opinions." S. 1940, *supra* note 5, § 3194; S. 1639, *supra* note 1, § 3194. Thus, it did not provide here for the relator's persecution because of his race, religion, or nationality. In addition, S. 1940 and S. 1639 did not provide in this subsection that the court does not have jurisdiction to determine whether the relator's return would be incompatible with humanitarian considerations. Instead, they simply stated in another subsection that such determination is solely within the discretion of the Secretary of State. S. 1940, *supra* note 5, § 3194(e)(2); S. 1639, *supra* note 1, § 3194(e)(2). The earlier Senate bills also did not state the limitations on the court's jurisdiction as separate subsections; this was provided for in a single paragraph. S. 1940, *supra* note 5, § 3194(a); S. 1639, *supra* note 1, § 3194(a). The originally enacted version of S. 1940 published in the Congressional Record also included language in this section that the court did not have jurisdiction "to determine whether the foreign state is seeking the extradition of the person for a political offense, [or] for an offense of a political character." 128 CONG. REC. S10,882 (daily ed. Aug. 19, 1982). This language first appeared in S. 1639, and was approved by the Senate Judiciary Committee. See Senate Judiciary Report on S. 1940, *supra* note 15, at 33. It was deleted by the Senate Foreign Relations Committee. See Senate Foreign Relations Report on S. 1940, *supra* note 20, at 18.

²²⁴H.R. 3347, *supra* note 8, § 3194(b)(2); H.R. 2643, *supra* note 8, § 3194(b)(2); H.R. 6046, *supra* note 5, § 3194(b)(2); H.R. 5227, *supra* note 2, § 3194(b)(2).

counsel if he is financially unable to obtain one.²²⁵ However, the Senate bill makes specific reference to 18 U.S.C. § 3006A²²⁶ with regard to the relator's right to court-appointed counsel, while the House bill makes no reference to any source of this right.²²⁷ In addition, the Senate version does not specifically provide that the relator's right to representation by counsel arises at the extradition hearing;²²⁸ the House version, on the other hand, provides that the right arises at the hearing.²²⁹

Both versions of the Act also provide for the relator's right to cross-examine witnesses. They differ, however, as to the scope of this right. The Senate bill provides only that the relator "may cross-examine witnesses who appear against him."²³⁰ The House bill goes beyond this, by stating that the relator has the right "to confront and cross-examine witnesses."²³¹ It contains no qualifying

²²⁵The Senate bill provides for the following:

(b) RIGHTS OF THE PERSON SOUGHT.

The court shall inform the person of the limited purpose of the hearing, and shall inform him that —

- (1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to section 3006A; and
- (2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

S. 220, *supra* note 7, § 3194(b); S. 1940, *supra* note 5, § 3194(b); S. 1639, *supra* note 1, § 3194(b).

The House version states the relator's rights in these terms:

(b)(1) At a hearing under this section, the person sought to be extradited has the right —

- (A) to representation by counsel, including counsel appointed without cost to such person if such person is financially unable to obtain counsel;
- (B) to confront and cross-examine witnesses; and
- (C) to introduce evidence with respect to the issues before the court.

H.R. 3347, *supra* note 8, § 3194(b)(1); H.R. 2643, *supra* note 8, § 3194(b)(1); H.R. 6046, *supra* note 5, § 3194(b)(1); H.R. 5227, *supra* note 2, § 3194(b)(1).

²²⁶See *supra* note 225. Oddly, the Senate Judiciary Report notes that this subsection of the bill is governed by 18 U.S.C. § 3401 (1979) regarding the jurisdiction of United States magistrates to try persons accused of misdemeanors. See Senate Judiciary Report on S. 1940, *supra* note 15, at 15.

²²⁷The House Judiciary Report similarly makes no reference to other legislation or case law which would provide guidelines as to the scope and limitations of this right. See House Judiciary Report on H.R. 6046, *supra* note 23, at 16.

²²⁸See *supra* note 225.

²²⁹H.R. 3347, H.R. 2643, H.R. 6046, and H.R. 5227 state: "At a hearing under this section, the person sought . . . has the right — (A) to representation by counsel . . ." H.R. 3347, *supra* note 8, § 3194(b)(1)(A); H.R. 2643, *supra* note 8, § 3194(b)(1)(A); H.R. 6046, *supra* note 5, § 3194(b)(1)(A); H.R. 5227, *supra* note 2, § 3194(b)(1)(A).

²³⁰S. 220, *supra* note 7, § 3194(b)(2); S. 1940, *supra* note 5, § 3194(b)(2); S. 1639, *supra* note 1, § 3194(b)(2).

²³¹H.R. 3347, *supra* note 8, § 3194(b)(1)(B); H.R. 2643, *supra* note 8, § 3194(b)(1)(B); H.R. 6046, *supra* note 5, § 3194(b)(1)(B); H.R. 5227, *supra* note 2, § 3194(b)(1)(B). The House Judiciary Report noted that this term was taken from 18 U.S.C. § 4214 (1976) relating to revocation of parole. See House Judiciary Report on H.R. 6046, *supra* note 23, at 16. Section 4214(a)(2), regarding the hearing to determine whether parole should be revoked, provides that the Parole Commission shall conduct the hearing according to the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation;

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests,

statement to the effect that this right is limited to a cross-examination of only those witnesses who appear against him.²³² None of the versions refer to compulsory attendance of witnesses favorable to the relator.

Finally, both bills give the relator the right to introduce certain evidence, although neither refers to discovery. The Senate bill provides that the relator "may introduce evidence in his own behalf with respect to the matters in subsection (d)"²³³ Subsection (d) is a statement of the findings the court must make in ordering the relator's extradition.²³⁴ They are substantially similar to those required under the House version.²³⁵ The House bill provides that the relator

to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

18 U.S.C. § 4214(a)(2)(A)-(D) (1976) (emphasis added). *See also* United States v. Caldera, 631 F.2d 1227 (5th Cir. 1980) (failure to provide parolee with adequate cross-examination required new evidentiary hearing); Ready v. United States Parole Comm'n, 483 F. Supp. 1273 (D.C. Pa. 1980) (parolee's right to cross-examine witnesses can be denied upon a showing of "good cause"); Galante v. United States Parole Comm'n, 466 F. Supp. 1266 (D. C. Conn. 1979) (good cause shown where witness' appearance would subject him to risk of harm).

²³²The House Judiciary Report indicated, however, that "[t]his right obviously does not expand the right of the person being sought to call as witnesses persons who prepared documents, because in many situations the ordinary rules of evidence allow the use of documents without requiring the presence of the author." House Judiciary Report on H.R. 6046, *supra* note 23, at 16.

²³³S. 220, *supra* note 7, § 3194(b)(2); S. 1940, *supra* note 5, § 3194(b)(2); S. 1639, *supra* note 1, § 3194(b)(2).

²³⁴Subsection (d) provides:

(d) FINDINGS. — The court shall find that the person is extraditable if it finds that —

- (1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;
- (2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;
- (3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and
- (4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of —
 - (A) the United States;
 - (B) the State where the fugitive is found; or
 - (C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

S. 220 *supra* note 7, § 3194(d); S. 1940, *supra* note 5, § 3194(d); S. 1639, *supra* note 1, § 3194(d).

²³⁵The House bill requires the following findings:

Except as otherwise provided in this chapter, the court shall order a person extraditable after a hearing under this section if the court finds —

- (A) probable cause to believe that the person before the court is the person sought;
- (B) (i) probable cause to believe that the person before the court committed the offense for which such person is sought; or
 - (ii) the evidence presented is sufficient to support extradition under the provisions of the applicable treaty concerning extradition; and
- (C) the conduct upon which the request for extradition is based —
 - (i) would be punishable under the laws of —
 - (I) the United States;
 - (II) the majority of the States of the United States; or
 - (III) the State where the fugitive is found; and
 - (ii) (I) at least one such offense is punishable by a term of more than one year's imprisonment, in the case of a person before the court who is sought for trial; or
 - (II) more than one hundred and eighty days of imprisonment remain to be served with respect to such offense; in the case of a person before the court who is sought for imprisonment.

H.R. 3347, *supra* note 8, § 3194(d)(1); H.R. 2643, *supra* note 8, § 3194(d)(1); H.R. 6046, *supra* note 5, § 3194(d)(1); H.R. 5227, *supra* note 2, § 3194(d)(1).

has the right to "introduce evidence with respect to the issues before the court."²³⁶ Both versions require that the court inform the relator of his rights and of the purpose of the hearing.²³⁷ The Senate bill states this latter aspect as a "limited purpose."²³⁸

There are numerous parts of this section which will present novel, and potentially difficult, issues of interpretation and implementation. First, the requirement in both versions of the Act that the hearing be held promptly is analogous to Rule 5 of the Federal Rules of Criminal Procedure.²³⁹ However, the legislation provides no sanctions for those instances when a hearing is not held promptly.²⁴⁰ Presumably this embodies a form of statutory speedy trial right which, though guaranteed under the sixth amendment, has not heretofore been held applicable to extradition proceedings.²⁴¹ The same situation prevails under section 3195 with respect to expedited appeals;²⁴² again, there are no sanctions for unreasonable delays. The judiciary may therefore find that the federal standards and sanctions for speedy trial are applicable²⁴³ and rely on the spirit of the legislation to accomplish this objective. The Act does not refer in any way to pre-trial discovery and it is assumed that existing jurisprudence would apply.²⁴⁴

In addition, the House version's provision for the relator's right to confront and cross-examine witnesses is unclear, since the bill does not state whether

²³⁶H.R. 3347, *supra* note 8, § 3194(b)(1)(C); H.R. 2643, *supra* note 8, § 3194(b)(1)(C); H.R. 6046, *supra* note 5, § 3194(b)(1)(C); H.R. 5227, *supra* note 2, § 3194(b)(1)(C).

²³⁷S. 220, *supra* note 7, § 3194(b); S. 1940, *supra* note 5, § 3194(b); S. 1639, *supra* note 1, § 3194(b); H.R. 3347, *supra* note 8, § 3194(c); H.R. 2643, *supra* note 8, § 3194(c); H.R. 6046, *supra* note 5, § 3194(c); H.R. 5227, *supra* note 2, § 3194(c).

²³⁸S. 220, *supra* note 7, § 3194(b); S. 1940, *supra* note 5, § 3194(b); S. 1639, *supra* note 1, § 3194(b).

²³⁹FED. R. CRIM. P. 5, quoted at *supra* note 147. The House Judiciary Committee explicitly recognized the analogy to Rule 5, elaborating that "[t]he requirement of a prompt hearing parallels the right of a criminal defendant to obtain a prompt determination of probable cause." House Judiciary Report on H.R. 6046, *supra* note 23, at 16. The Senate Judiciary Committee's observation of the analogy to Rule 5 was made regarding the bill's requirement that the relator "be taken without unnecessary delay before the nearest available Federal court for an extradition hearing" in § 3192(c). See Senate Judiciary Report on S. 1940, *supra* note 15, at 8. The Report made no observation on § 3194(a)'s requirement that the hearing be held "as soon as practicable" after the relator's arrest or the issuance of a summons. Even though the Report notes that one of the purposes of the new bill is to "codify the right of a fugitive to legal representation and to a speedy determination of an extradition request," *id.* at 5, it can be reasonably inferred that the Committee intended the analogy to Rule 5 to apply to this latter section of the bill as well.

²⁴⁰In addition, there is no mention of sanction in either the Senate or House Judiciary Report. See Senate Judiciary Report on S. 1940, *supra* note 14, at 13-14; House Judiciary Report on H.R. 6046, *supra* note 22, at 16.

²⁴¹See *Caltagirone v. Grant*, 629 F.2d 739; *Sabatier v. Dambrowski*, 453 F. Supp. 1250 (D.R.I. 1978); *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977).

²⁴²The provision regarding appeal, § 3195, is discussed *infra* notes 336-71 and accompanying text.

²⁴³See *Barker v. Wingo*, 407 U.S. 514 (1972); *Smith v. Hooey*, 393 U.S. 374 (1969) (concerning imprisoned defendants); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972), *aff'd*, 412 U.S. 434 (1973). See also *Uviller, Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376 (1972); *Amsterdam, Speedy Criminal Trial: Rights and Remedies*, 27 STANFORD L. REV. 575 (1975). Concerning the rights of defendants to speedy disposition, see *United States v. Lovasco*, 431 U.S. 783 (1977).

²⁴⁴See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 17, at ch. IX, § 4.

or not the court can compel the appearance of witnesses who are outside the United States.²⁴⁵ This provision is analogous to 18 U.S.C. § 4214 applicable to federal criminal proceedings,²⁴⁶ even though, as stated above, the legislative history of the Act specifies that such rules do not *per se* apply to extradition proceedings.²⁴⁷ Nevertheless, such analogies are appropriate if one seeks guidance from the legislative intent. Moreover, the bill does not provide for the right of the relator to compel the appearance of any affiant or person who prepared any of the affidavits presented by the government on behalf of the requesting state.²⁴⁸ Thus, while certain procedural rights of the defense are specified which are analogous to those existing by statute and case law to federal and state criminal proceedings, none of the remedies or sanctions for their violation are specified in the Act. This problem is recurring throughout the Act, which does not refer to these counterpart constitutional rights and standards applied in federal and state criminal proceedings. Nevertheless the Act creates sufficient inferences for courts to reach the conclusion that some analogy exists between procedural norms under the Act and their counterpart in federal criminal proceedings. This may well result in the increased litigation of these questions.

B. Evidence and the Authentication of Documents

Both versions of the Act provide that properly authenticated documents may be admitted. Essentially, the Act provides that such documents are admissible if they have been properly authenticated under either the terms of the applicable treaty, the laws of the United States, or the laws of the state requesting extradition.²⁴⁹ The House version differs from that of the Senate in that it specifies that authentication, if being established under the laws of the United States, must be performed in accordance with "the Federal Rules of Evidence for proceedings to which such rules apply."²⁵⁰ The Senate bill requires only that authentication in this instance be performed in accordance with the "applicable . . . law of the United States."²⁵¹ In addition, the Senate bill states that documents not authenticated according to the requirements of one of the three methods listed above are nonetheless admissible if there is a showing of "other evidence . . . sufficient to enable the court to conclude that the document is authentic."²⁵²

²⁴⁵See *supra* note 232.

²⁴⁶See *supra* note 231.

²⁴⁷See Senate Judiciary Report on S. 1940, *supra* note 15, at 10; House Judiciary Report on 6046, *supra* note 23, at 14.

²⁴⁸In fact, the House Judiciary Committee posited that the Act does not give the relator any greater right to do so than that provided for in current jurisprudence. See *supra* note 232.

²⁴⁹S. 220, *supra* note 7, § 3194(c)(1); S. 1940, *supra* note 5, § 3194(c)(1); S. 1639, *supra* note 1, § 3194(c)(1); H.R. 3347, *supra* note 8, § 3194(g)(1); H.R. 2643, *supra* note 8, § 3194(g)(1); H.R. 6046, *supra* note 5, § 3194(g)(1); H.R. 5227, *supra* note 2, § 3194(g)(1).

²⁵⁰H.R. 3347, *supra* note 8, § 3194(g)(1)(B); H.R. 2643, *supra* note 8, § 3194(g)(1)(B); H.R. 6046, *supra* note 5, § 3194(g)(1)(B); H.R. 5227, *supra* note 2, § 3194(g)(1)(B).

²⁵¹S. 220, *supra* note 7, § 3194(c)(1)(A); S. 1940, *supra* note 5, § 3194(c)(1)(A); S. 1639, *supra* note 1, § 3194(c)(1)(A).

²⁵²S. 220, *supra* note 7, § 3194(c)(1)(C); S. 1940, *supra* note 5, § 3194(c)(1)(C); S. 1639, *supra* note 1, § 3194(c)(1)(C).
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Both versions of the Act also provide that the existence of a treaty may be established through an "affidavit by an appropriate official of the Department of State."²⁵³ The Senate version also provides that a certificate from such an official, rather than an affidavit, may establish the existence of a treaty between the United States and the requesting state.²⁵⁴ In addition, the Senate bill states that such certificate or affidavit is admissible to establish not only the existence of a treaty, but also to establish the treaty's interpretation.²⁵⁵ The House bill simply states that such affidavit is admissible to prove "the existence of a treaty relationship between the United States and a foreign state."²⁵⁶

Both versions of the Act state that the court may consider hearsay evidence as well as properly authenticated documents in making its decision.²⁵⁷ In addition, both the Senate and the House versions state that if the applicable treaty

requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense were committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that the offense was committed and that the person sought committed the offense.²⁵⁸

A better, simpler, and more expeditious formula would have been to allow authentication in accordance with the Hague Convention.²⁵⁹

C. Substantive Requirements: Double Criminality and Probable Cause

The Act essentially provides that the court determine issues regarding the requirement of double criminality and probable cause. The Senate and House bills vary in their treatment of these two requirements, one of which (double criminality) is of a truly substantive nature, while the other (probable cause) is to this writer more of a procedural, constitutional dimension.

1. The Requirement of Double Criminality

Traditionally the most important substantive requirement for extradition

²⁵³S. 220, *supra* note 7, § 3194(c)(2); S. 1940, *supra* note 5, § 3194(c)(2); S. 1639, *supra* note 1, § 3194(c)(2); H.R. 3347, *supra* note 8, § 3194(g)(2); H.R. 2643, *supra* note 8, § 3194(g)(2); H.R. 6046, *supra* note 5, § 3194(g)(2); H.R. 5227, *supra* note 2, § 3194(g)(2).

²⁵⁴S. 220, *supra* note 7, § 3194(c)(2); S. 1940, *supra* note 5, § 3194(c)(2); S. 1639, *supra* note 1, § 3194(c)(2).

²⁵⁵*Id.*

²⁵⁶H.R. 3347, *supra* note 8, § 3194(g)(2); H.R. 2643, *supra* note 8, § 3194(g)(2); H.R. 6046, *supra* note 5, § 3194(g)(2); H.R. 5227, *supra* note 2, § 3194(g)(2).

²⁵⁷S. 220, *supra* note 7, § 3194(d); S. 1940, *supra* note 5, § 3194(d); S. 1639, *supra* note 1, § 3194(d); H.R. 3347, *supra* note 8, § 3194(g)(3); H.R. 2643, *supra* note 8, § 3194(g)(3); H.R. 6046, *supra* note 5, § 3194(g)(3); H.R. 5227, *supra* note 2, § 3194(g)(3).

²⁵⁸S. 220, *supra* note 7, § 3194(c)(3); S. 1940, *supra* note 5, § 3194(c)(3); S. 1639, *supra* note 1, § 3194(c)(3); H.R. 3347, *supra* note 8, § 3194(h); H.R. 2643, *supra* note 8, § 3194(h); H.R. 6046, *supra* note 5, § 3194(h); H.R. 5227, *supra* note 2, § 3194(h).

²⁵⁹Convention abolishing the Requirements of Legalization of Foreign Public Documents, signed at the Hague, Oct. 5, 1961, 527 UNTS 189, ____ UST ____, T.I.A.S. No. 10072 (entered into force with respect to the United States Oct. 15, 1981).

is that the crime for which the relator is sought be an offense listed in the extradition treaty and that such an offense constitute a crime under the laws of the state wherein the individual was found or under federal criminal law.²⁶⁰ This is known as the rule of double criminality.²⁶¹

Both the Senate and House versions of the Act broaden this requirement by establishing that the offense must be punishable under the laws of: (1) the United States; (2) the majority of the states; or (3) the state where the relator was found.²⁶²

This provision states that if the offense is punishable under the laws of "the majority of the states," it will be deemed to have satisfied the rule of double criminality. Assuming the government is proceeding on this basis, it is obvious that such a provision causes a problem in determining what constitutes a crime under the majority of the states — whether this is a numerical standard or simply a general conceptual one.²⁶³ This also poses a problem with respect to establishing "probable cause." Which state law will be relied upon to, first, determine the elements of the crime, and, second, to apply these elements to the facts of the case to determine probable cause? In addition, it is unclear what standards will be relied upon. This may pose a challenge for the courts to arrive at a workable solution. It is not likely that there will be uniformity in the different circuits until the Supreme Court decides the question. With the large number of states that have adopted, in one form or another, the American Law Institute Model Penal Code,²⁶⁴ there may be more uniformity in United States criminal laws than one would expect in light of historical differences in state criminal laws.²⁶⁵

The House version, unlike the Senate's, at this writer's suggestion²⁶⁶ introduced a new dimension to the rule of double criminality by requiring that the offense in question be punishable by at least one year's imprisonment in the event the person is sought for trial; or, in the event the person is sought for imprisonment, that the sentence that remains to be served with respect to such offense

²⁶⁰See *Caplan v. Vokes*, 649 F.2d 1336, 1343 (9th Cir. 1981); *Hu Yau-Leung v. Soscia*, 649 F.2d at 916-18; *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980); *Jimenez v. Aristeguieta*, 311 F.2d 547, 562-63 (5th Cir. 1962). See also *Matter of Assarsson*, 635 F.2d 1237, 1245 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981) (treaty provision allowing extradition for offense which is not a crime in United States is permissible).

²⁶¹See generally 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 3.

²⁶²H.R. 3347, *supra* note 8, § 3194(d)(1)(C); H.R. 2643, *supra* note 8, § 3194(d)(1)(C); H.R. 6046, *supra* note 5, § 3194(d)(1)(C); H.R. 5227, *supra* note 2, § 3194(d)(1)(C). S. 220, S. 1940, and S. 1639 list these same three sources, but state them as: (1) the laws of the United States; (2) the laws of the state where the relator is found; or (3) the laws of the majority of states. S. 220, *supra* note 7, § 3194(d)(4); S. 1940, *supra* note 5, § 3194(d)(4); S. 1639, *supra* note 2, § 3194(d)(4).

²⁶³See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 22 (testimony of M. Cherif Bassiouni); *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 99 (testimony of M. Cherif Bassiouni).

²⁶⁴MODEL PENAL CODE AND COMMENTARIES (1980).

²⁶⁵See generally M.C. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW (1978).

²⁶⁶See *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 103.

exceed 180 days.²⁶⁷ This will avoid using the lengthy and costly extradition proceedings for minor criminal matters.

The Act wisely dispenses with the unnecessary historical practice in United States extradition treaties of specifically listing extraditable offenses. This prior practice only meant that a determination of the extraditability for the offense charged had to conform to the crime as listed in the treaty. This was the object of delaying litigation when the terms used in the list did not conform exactly to the offense charged or became obsolete (i.e., does larceny mean theft, does theft include embezzlement, etc.).²⁶⁸ It also gave rise to the need to renegotiate treaties for inclusion of new forms of criminality (i.e., computer crime today, hijacking some few years ago), with all of the lengthy Senate ratification that this process entails.

2. The Requirement of Probable Cause and Evidentiary Standards

a. Probable Cause

Both the Senate and House bills state that the Attorney General must show the existence of "probable cause to believe that the person before the court is the person sought," in order for the court to grant extradition.²⁶⁹ The two bills differ, however, as to the requirement that there be probable cause to believe that the relator committed the offense for which he is sought.

The Senate bill makes no explicit statement regarding probable cause that the relator committed the offense(s) specified in the complaint. Instead, it merely states that the evidence presented must be "sufficient to support the complaint under the provisions of the applicable treaty."²⁷⁰

The House version states that the Attorney General must show *either* that there is "probable cause to believe that the person before the court committed the offense for which such person is sought; or [t]he evidence presented is sufficient to support extradition under the provisions of the applicable treaty concerning extradition"²⁷¹

Current United States extradition practice requires a showing of probable

²⁶⁷The House bill requires that at least one offense must be punishable by "a term of more than one year's imprisonment, in the case of a person before the court who is sought for trial; or [that] more than one hundred and eighty days of imprisonment remain to be served with respect to such offense, in the case of a person before the court who is sought for imprisonment." H.R. 3347, *supra* note 8, § 3194(d)(1)(C)(ii); H.R. 2643, *supra* note 8, § 3194(d)(1)(C)(ii); H.R. 6046, *supra* note 5, § 3194(d)(1)(C)(ii). This provision was not included in the original House bill, H.R. 5227, and was inserted in the subsequent drafts.

²⁶⁸See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 5.

²⁶⁹H.R. 3347, *supra* note 8, § 3194(d)(1)(A); H.R. 2643, *supra* note 8, § 3194(d)(1)(A); H.R. 6046, *supra* note 5, § 3194(d)(1)(A); H.R. 5227, *supra* note 2, § 3194(d)(1)(A). S. 220, S. 1940, and S. 1639 state that "[t]he court shall find that the person is extraditable if it finds that — (1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state" S. 220, *supra* note 7, § 3194(d)(1); S. 1940, *supra* note 5, § 3194(d)(1); S. 1639, *supra* note 1, § 3194(d)(1).

²⁷⁰S. 220, *supra* note 7, § 3194(d)(2); S. 1940, *supra* note 5, § 3194(d)(2); S. 1639, *supra* note 1, § 3194(d)(2).

²⁷¹H.R. 3347, *supra* note 8, § 3194(d)(1)(B); H.R. 2643, *supra* note 8, § 3194(d)(1)(B); H.R. 6046, *supra* note 5, § 3194(d)(1)(B); H.R. 5227, *supra* note 2, § 3194(d)(1)(B).

cause that the relator committed the offense for which his extradition is requested.²⁷² It would appear that the Senate version implicitly eliminates this requirement if an extradition treaty between the United States and the requesting state provided that probable cause need not be established. Since such language in a treaty would draw public attention and criticism, and if ratified would risk being declared unconstitutional, the administration has phrased this provision of the Senate version in such a way that a treaty could simply be silent on the requirement of probable cause (as is the case in a new treaty with Italy signed in 1983 but not yet ratified by the Senate). The government could then argue that the lack of explicit statutory language eliminates the requirement of probable cause unless required by treaty. The constitutionality of the requirement of probable cause for extradition will certainly arise in this instance. Surely if the fourth amendment requires probable cause for the relator's arrest it is difficult to conceive how that same requirement will not be deemed constitutionally necessary for extradition,²⁷³ unless the relator waives it under section 3193 of the Act.

Under the House version's provision, however, it could be argued that the requirement of probable cause need not be met if the applicable treaty ratified subsequent to the Act specifically excludes it. However, the legislative history of the bill notes that the provision is intended to incorporate the constitutional dimension of probable cause into the extradition procedure by stating that such incorporation is "consistent with constitutional requirements under domestic law."²⁷⁴ Thus, for the House, unlike the Senate, the requirement of probable cause is presumably a minimum standard below which an extradition treaty cannot fall. This is an issue which is very likely to be litigated for some time to come. Nevertheless, even in the House version it is not explicitly stated in the text in order to accommodate the administration's desire to eliminate the requirement if not by legislation then by treaty, or through ambiguity permitting such judicial interpretation.

The applicability of the requirement of probable cause also raises questions under the Act where the basis of the extradition request is a multilateral international criminal law convention containing an extradition clause and to

²⁷²See 18 U.S.C. § 3184 (1976). Since the Supreme Court's decisions in *Collins v. Loisel*, 259 U.S. 309, and *Fernandez v. Phillips*, 268 U.S. 311, the appellate courts have consistently required a showing of probable cause without expressly making that showing a constitutional requirement. See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 507-08 (7th Cir. 1981), cert. denied, 102 S. Ct. 390 (1982); *Antunes v. Vance*, 640 F.2d 4-5; *Escobedo v. United States*, 623 F.2d 1098, 1102 (5th Cir. 1980), reh'g. denied, 451 U.S. 934 (1981); *Brauche v. Raiche*, 618 F.2d at 854; *Hooker v. Klein*, 573 F.2d 1360, 1367, 1369 (9th Cir. 1978), cert. denied, 439 U.S. 932 (1978); *Jhirad v. Ferrandina*, 536 F.2d 478, 485 (2d Cir. 1976), reh'g. denied, 429 U.S. 988 (1976).

²⁷³At hearings before the Senate Judiciary Committee, this writer noted that such a provision would likely be found unconstitutional, as the Fourth Amendment requires probable cause for a relator's arrest. It is difficult to conceive how the relator could be arrested only upon a showing of probable cause but could be subsequently extradited without probable cause. See *Senate Judiciary Hearings on S. 1639*, supra note 3, at 21.

²⁷⁴House Judiciary Report on H.R. 6046, supra note 23, at 17.

which the United States is a party.²⁷⁵ If such a treaty is deemed applicable,²⁷⁶ presumably no probable cause would be required and the constitutionality of such a practice would be questionable.²⁷⁷ The Senate version would allow such a situation, while the House version would not for reasons stated above. A further complication can arise if probable cause is not statutorily required: if the offense for which extradition is requested is not included in the bilateral extradition treaty between the United States and the requesting state, but the treaty requires probable cause, and the said offense is found in an applicable multilateral international criminal law convention which does not require probable cause, will the bilateral extradition treaty control with regard to probable cause? The answer is likely to be in the positive even though the Act does not address this question on the theory that the basis for the request is the bilateral treaty, and the multilateral treaty is merely in the nature of a supplement to the list of extraditable offenses. While this writer does not favor this eventual approach, as a better one would be to rely on the multilateral treaty and the legislation without regard to the bilateral treaty, it is most likely to be urged by the Administration.

b. Evidentiary Standards

The essence of probable cause lies in the evidentiary standards applied. In this respect the Act and the legislative history of all versions in the Senate and House give very sparse consideration to this important question upon which most extradition cases turn.

Both versions of the Act allow the court to consider hearsay evidence.²⁷⁸ This is merely a codification of existing extradition practice²⁷⁹ and is consistent with federal and state criminal procedures for the issuance of warrants.²⁸⁰ However, in relying on hearsay for probable cause, courts may be faced with new constitutional tests.²⁸¹

In the typical extradition case, reliability and credibility of the source will usually pose no problem as long as the statements submitted from the requesting state were made under oath. However, courts have not been true to the constitutional requirements where they have considered unsworn statements without

²⁷⁵See *supra* note 78.

²⁷⁶See *supra* notes 65-81 and accompanying text regarding the use of multilateral international criminal law conventions.

²⁷⁷See *Caltagirone v. Grant*, 629 F.2d 739.

²⁷⁸S. 220, *supra* note 7, § 3194(d); S. 1940, *supra* note 5, § 3194(d); S. 1639, *supra* note 1, § 3194(d); H.R. 3347, *supra* note 8, § 3194(g)(3); H.R. 2643, *supra* note 8, § 3194(g)(3); H.R. 6046, *supra* note 5, § 3194(g)(3); H.R. 5227, *supra* note 2, § 3194(g)(3).

²⁷⁹*E.g.*, *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980); *O'Brien v. Rozman*, 554 F.2d 780, 782 (6th Cir. 1977) (per curiam); *Magisano v. Locke*, 545 F.2d 1228, 1230 (9th Cir. 1976).

²⁸⁰*Spinelli v. United States*, 393 U.S. at 412; *McCray v. Illinois*, 386 U.S. 300, 311 (1967).

²⁸¹See *Illinois v. Gates*, 103 S. Ct. 2317; *Aguilar v. Texas*, 378 U.S. 108. See also *Franks v. Delaware*, 438 U.S. 154, 165 (1978).

even mentioning the credibility of the source.²⁸² A review of the jurisprudence concerning the test of "underlying circumstances," which allows the judge to exercise independent judgment of the sufficiency of the evidence presented, reveals that this burden has generally been met.²⁸³ It remains to be seen what test is formally incorporated into the determination of probable cause to extradite, and whether or not the evidentiary standard is more or less stringently applied.²⁸⁴ The question, however, is not so much what the government has to prove and by what legal standard, for that has not been a serious problem for the government (although it has caused delays and difficulties in relations with requesting states not accustomed to common law requirements of "probable cause"), but what evidence the relator is entitled to present in defense or rebuttal.

The critical distinction between the magistrate's initial finding of probable cause to arrest and the magistrate's determination of probable cause to extradite is that at the extradition hearing a relator may not introduce evidence to rebut probable cause which is in the nature of a defense. He may only introduce evidence which clarifies or explains the evidence presented against him.²⁸⁵ The existing standard which the Act ostensibly establishes statutorily is that a relator cannot introduce evidence which would tend to show that he is not guilty of the crime charged either by contradicting the evidence submitted against him or by establishing an alibi.²⁸⁶

The House version of the Act broadens existing jurisprudence by expressly allowing a relator "to introduce evidence with respect to the issues before the court."²⁸⁷ The legislative history indicates that this statutory provision is intended to permit the introduction of evidence relevant to the issues before the

²⁸²*E.g.*, *O'Brien v. Rozman*, 554 F.2d at 783; *Greci v. Birknes*, 527 F.2d 956, 958 (1st Cir. 1976); *United States ex rel. Sakaguchi v. Kaulukukui*, 520 F.2d 726, 730 (9th Cir. 1975); *Shapiro v. Ferrandina*, 478 F.2d 894, 901-902 (2d Cir. 1973). *But see* *Freedman v. United States*, 437 F. Supp. at 1256 ("the question of reliability may come into focus").

²⁸³*E.g.*, *Caplan v. Vokes*, 649 F.2d 1336; *In re Williams*, 496 F. Supp. 16 (S.D.N.Y. 1979).

²⁸⁴*See, e.g.*, *Beaulieu v. Hartigan*, 554 F.2d 1 (1st Cir. 1977); *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), *cert. denied* 405 U.S. 989 (1972); *In re Extradition of David*, 395 F. Supp. 803 (E.D. Ill. 1975), *aff'd sub nom. David v. United States*, 699 F.2d 411 (7th Cir. 1983).

²⁸⁵*Eain v. Wilkes*, 641 F.2d at 511; *Shapiro v. Ferrandina*, 478 F.2d at 905. At the extradition hearing the government also has the opportunity to introduce additional information in order to support the information which accompanied the initial request for the arrest warrant. Thus in determining whether or not there exists probable cause to extradite, the hearing magistrate is not limited to the four corners of the arrest warrant.

²⁸⁶Section 3194(b)(2) of the House bill states that "[t]he guilt or innocence of the person sought to be extradited of the charges with respect to which extradition is sought is not an issue before the court." H.R. 3347, *supra* note 8, § 3194(b)(2); H.R. 2643, *supra* note 8, § 3194(b)(2); H.R. 6046, *supra* note 5, § 3194(b)(2); H.R. 5227, *supra* note 2, § 3194(b)(2). The Senate version states that "[t]he court does not have jurisdiction to determine the merits of the charge against the person by the foreign state . . ." S. 220, *supra* note 7, § 3194(a); S. 1940, *supra* note 5, § 3194(a); S. 1639, *supra* note 1, § 3194(a). *See also* *Hooker v. Klein*, 573 F.2d at 1368; *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970). Of course, evidence relevant to establishing a defense available under the applicable treaty is admissible.

²⁸⁷H.R. 3347, *supra* note 8, § 3194(b)(1)(C); H.R. 2643, *supra* note 8, § 3194(b)(1)(C); H.R. 6046, *supra* note 5, § 3194(b)(1)(C); H.R. 5227, *supra* note 2, § 3194(b)(1)(C).

court.²⁸⁸ Although there is no indication as to the precise meaning of "relevant," reference by analogy would have to be made to the Federal Rules of Evidence to explain the breadth and application of such relevant evidence.²⁸⁹

Since the only issue expressly not before the court is the guilt or innocence of the relator, both versions of the Act erode by inference the existing judicially created rule that disallows contradictory evidence. Thus, a relator may be permitted to introduce evidence which attacks the truthfulness of the factual allegations presented by the United States government on behalf of the requesting state. In addition to this statutory interpretation, there is strong constitutional authority, in *Franks v. Delaware*,²⁹⁰ to support the proposition that a relator has the right to introduce evidence to contradict falsehoods which are contained in affidavits presented against him, if the defendant makes a substantial preliminary showing that a false statement was knowingly and intentionally, or with a reckless disregard for the truth, included by the affiant, and if the allegedly false statement was necessary to the issuing magistrate's finding of probable cause. In that case a hearing must be held; if the defendant then establishes the allegation of perjury or reckless disregard by a preponderance of the evidence, and if the remaining content of the affidavit is insufficient to establish probable cause, then the warrant must be voided.²⁹¹ It must be noted, however, that falsehoods due to negligence or innocent mistake are not susceptible to challenge.²⁹² *Franks*-like situations have not arisen in extradition proceedings, if for no other reason than the fact that no court has ever allowed the relator the opportunity to present evidence or seek discovery leading to such a conclusion because of the narrowly interpreted evidentiary openings for the relator. Under the House version such evidence would be relevant and thus admissible, and if relevant, it might open an avenue for discovery that the court could not deny the relator.

D. Defenses to Extradition

Although there are a number of defenses to extradition which could have been included in the Act,²⁹³ the Senate and House bills provide for only a few. Both contain a provision regarding the political offense exception to

²⁸⁸House Judiciary Report on H.R. 6046, *supra* note 23, at 16.

²⁸⁹FED. R. EVID. 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

²⁹⁰438 U.S. 154 (1978).

²⁹¹*Id.* at 155-56, 171-72.

²⁹²*Id.* at 171.

²⁹³*See Senate Judiciary Hearings on S. 1639, supra* note 3, at 3 (testimony of M. Cherif Bassiouni); *House Judiciary Hearings on H.R. 5227, supra* note 4, at 101, 106 (testimony of M. Cherif Bassiouni). *See generally* 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. IX, § 1.

extradition²⁹⁴ and for defenses included in the applicable treaty.²⁹⁵ The House version also allows for the defense of lapse of the statute of limitations, even if not included in the applicable treaty.²⁹⁶

The Act's provisions for so few defenses is contrary to the practice of most countries in the world.²⁹⁷ In addition, it is silent with respect to a controversial issue which has been argued before a number of federal district and circuit courts, namely opposition to the court's exercise of jurisdiction when the presence of the relator is due to an unlawful seizure abroad.²⁹⁸ The Act presumably leaves this question to the development of United States jurisprudence.

1. The Political Offense Exception

The political offense exception was the most extensively debated issue at congressional hearings on all the proposed bills.²⁹⁹ Both versions define the

²⁹⁴See S. 220, *supra* note 7, § 3194(e); S. 1940, *supra* note 5, § 3194(e); S. 1639, *supra* note 1, § 3194(e); H.R. 3347, *supra* note 8, § 3194(e); H.R. 2643, *supra* note 8, § 3194(e); H.R. 6046, *supra* note 5, § 3194(e); H.R. 5227, *supra* note 2, § 3194(e).

²⁹⁵See S. 220, *supra* note 7, § 3194(d)(3); S. 1940, *supra* note 5, § 3194(d)(3); S. 1639, *supra* note 1, § 3194(d)(3); H.R. 3347, *supra* note 8, § 3194(d)(2)(B); H.R. 2643, *supra* note 8, § 3194(d)(2)(B); H.R. 6046, *supra* note 5, § 3194(d)(2)(B); H.R. 5227, *supra* note 2, § 3194(d)(2)(B).

²⁹⁶See H.R. 3347, *supra* note 8, § 3194(d)(2)(A); H.R. 2643, *supra* note 8, § 3194(d)(2)(A); H.R. 6046, *supra* note 5, § 3194(d)(2)(A); H.R. 5227, *supra* note 2, § 3194(d)(2)(A). H.R. 3347 also provides for the defenses of (1) "prosecution or punishment because of . . . race, religion, sex, nationality, membership in a particular social group or political opinion," and (2) "fundamental unfairness" as a result of extradition. H.R. 3347, *supra* note 8, § 3194(d)(2)(D). The bill further states:

The Government shall disclose to the court any information in the possession of the Government that would tend to establish the validity of a defense against extradition, unless such disclosure is prohibited by law.

H.R. 3347, *supra* note 8, § 3194(e)(1)(C).

²⁹⁷See generally 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 1.

²⁹⁸See *1 id.* at ch. V, § 1. See also *David v. United States*, 699 F.2d 41; *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *United States v. Lovato*, 520 F.2d 1970; *Waits v. McGowan*, 516 F.2d 203 (3d Cir. 1975); *United States v. Lira*, 515 F.2d 68 (2d Cir., *cert. denied*, 423 U.S. 847 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974); *United States v. Toscanino*, 500 F.2d 267.

²⁹⁹See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 2 (testimony of M. Abbell, Dep't of Justice); *id.* at 8 (testimony of D. McGovern, Dep't of State); *id.* at 20 (testimony of M. C. Bassiouni, DePaul University College of Law); *id.* at 29 (testimony of W. Hannay); *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 25 (testimony of R. Olsen and M. Abbell, Dep't of Justice); *id.* at 31 (testimony of D. McGovern, Dep't of State); *id.* at 49 (testimony of D. Carliner, International Human Rights Law Group); *id.* at 64 (testimony of R. Falk, Princeton University School of Law); *id.* at 71 (testimony of W. Henderson, ACLU); *id.* at 85 (testimony of W. Goodman, Topel & Goodman); *id.* at 98 (testimony of M. C. Bassiouni, DePaul University College of Law); *id.* at 108 (testimony of S. Lubet, Northwestern University School of Law); *id.* at 141 (testimony of K. O'Dempsey, Brehon Law Society, R. Capulong, Alliance for Philippine Concerns); *id.* at 209 (prepared statement of C. Pyle, Mount Holyoke College); *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 26. The Senate Judiciary Committee version of S. 1940 placed the political offense exception outside the jurisdiction of the federal court. Instead, it gave the Secretary of State the authority to determine the applicability of the exception. It also established criteria by which this determination was to be made, and provided for appeal of the Secretary's decision, such appeal to be successful if the federal court found that the Secretary's decision was not based on substantial evidence. See *Senate Judiciary Report on S. 1940*, *supra* note 14, at 33-36. The Senate Foreign Relations Committee amended S. 1940 by placing the exception under the jurisdiction of the federal courts, and establishing criteria by which the court's determination is to be made. See *Senate Foreign Relations Report on S. 1940*,

political offense exception by listing those acts which cannot be considered a political offense. In both the Senate and House bills, the following offenses may *not* be considered political offenses:

(A) an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970;

(B) an offense within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on September 23, 1971;

(C) a serious offense involving an attack against the life, physical integrity, or liberty of internationally protected persons (as defined in section 1116 of this title), including diplomatic agents;

(D) an offense with respect to which a multilateral treaty obligates the United States to either extradite or prosecute a person accused of the offense;

(E) an offense that consists of the manufacture, importation, distribution, or sale of narcotics or dangerous drugs;

(F) an attempt or conspiracy to commit an offense described [above] . . . , or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense.³⁰⁰

The offense of rape may not be considered a political offense under any circumstances in the Senate bill. Under the House bill, however, rape may be

³⁰⁰S. 220, *supra* note 7, § 3194(e)(1)(A)-(E), 3194(e)(1)(G); S. 1940, *supra* note 5, § 3194(e)(1)(A)-(E), 3194(e)(1)(G); H.R. 2643, *supra* note 8, § 3194(e)(2). The prior House bill, H.R. 6046, provided that these offenses could be deemed "political offenses" in "extraordinary circumstances." See H.R. 6046, *supra* note 5, § 3194(e)(2)(A)-(D), 3194(e)(2)(G), 3194(3)(2)(H). In addition, this prior bill stated that an offense could not be deemed a political offense if it were "an offense with respect to which a *treaty* obligates the United States to either extradite or prosecute a person accused of the offense," *id.* § 3194(e)(2)(D) (emphasis added), rather than requiring that such duty to prosecute or extradite be included in a multilateral treaty, as both Senate bills and the subsequent House bill provide. See S. 220, *supra* note 7, § 3194(e)(1)(D); S. 1940, *supra* note 5, § 3194(e)(1)(D); H.R. 2643, *supra* note 8, § 3194(e)(2)(D).

The original House bill, H.R. 5227, stated that these crimes would not *normally* be considered political offenses. H.R. 5227, *supra* note 2, § 3194(e)(2)(B). The original Senate bill, S. 1639, did not include a listing of crimes outside the definition of the "political offense exception," since under this bill the entire issue was outside the court's jurisdiction. See S. 1639, *supra* note 1, § 3194(a).

H.R. 3347 provides that the last four offenses listed above cannot be deemed political offenses. In addition, the bill states that "forcible sexual assault" is not a political offense, as well as "an offense that consists of intentional, direct participation in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily injury to persons not taking part in armed hostilities." H.R. 3347, *supra* note 8, § 3194(e)(2). Moreover, the bill deletes the distinction between those offenses which could never be considered political offenses and those which could be so deemed under "extraordinary circumstances." Instead, the bill provides in subsection (3):

The inclusion in paragraph (2) of this subsection of certain offenses does not preclude the exclusion of other offenses from the political offense category. In determining whether an offense is a political offense the court shall consider, as of the time of the offense —

(A) the status (whether civilian, governmental, or military) of any victims of the alleged offense;

(B) the relationship of the alleged offender to a political organization;

(C) the existence of a civil uprising, rebellion, widespread civil unrest, or insurrection within the State requesting extradition;

(D) the motive of the alleged offender for the conduct alleged to constitute the offense;

(E) the nexus of such alleged conduct to the goals of a political organization; and

(F) the seriousness of the offense.

considered a political offense in extraordinary circumstances.³⁰¹ Both versions of the Act provide that the following conduct may be considered a political offense in extraordinary circumstances: "(1) an offense that consists of homicide, assault with intent to commit serious bodily injury, kidnapping, the taking of a hostage, or serious unlawful detention; (2) an offense involving the use of a firearm (as such term is defined in section 921 of this title) if such use endangers a person other than the offender; (3) an attempt or conspiracy to commit an offense described [above] . . . , or participation as an accomplice of a person who commits, attempts, or conspires to commit such an offense."³⁰²

By defining the political offense exception through examples rather than through generic definitions, both versions may force the courts into a difficult position due to insufficient flexibility in determining the validity of the relator's political motives in committing the offense. Instead, the Act should define the purely political offense as a general defense and the relative political offense as a qualified defense, with the exclusion of international crimes except for exceptional circumstances as the House version did.³⁰³

A purely political offense is still a defense under the Act, but only by implication. The offense itself is labelled a crime because it constitutes a subjective threat to the state's political, religious or racial ideology or its supporting structure, or both.³⁰⁴ The offense has none of the elements of a common crime, where a private wrong has been committed through the injury to private persons, property or interests. Treason, sedition, and espionage are offenses directed against the state itself and are, therefore by definition, a threat to the state's existence, welfare, and security. If such an act is linked to a common crime, however, it loses its purely political character and no longer benefits from the defense.

In contrast the relative political offense³⁰⁵ is almost entirely eliminated in the Senate version because it contains an element of violence which creates a private wrong. The relative political offense can be an extension of the purely political offense, or it can be a common crime prompted by ideological motives.

³⁰¹S. 220, *supra* note 7, § 3194(e)(1)(F); H.R. 2643, *supra* note 8, § 3194(e)(3)(C); H.R. 6046, *supra* note 5, § 3194(e)(2)(E); H.R. 5227, *supra* note 2, § 3194(e)(2)(E). H.R. 3347 states that "forcible sexual assault" may not be deemed a political offense, subject to the factors of subsection (3). *See supra* note 300. S. 1940, similar to H.R. 6046, provided that the offense of rape could be considered a political offense in extraordinary circumstances. *See* S. 1940, *supra* note 5, § 3194(e)(2)(A).

³⁰²S. 220, *supra* note 7, § 3194(e); S. 1940, *supra* note 5, § 3194(e); H.R. 2643, *supra* note 8, § 3194(e)(3); H.R. 6046, *supra* note 5, § 3194(e)(2)(E), (F), (H); H.R. 5227, *supra* note 2, § 3194(e)(2)(E), (F), (H). H.R. 3347 does not make the distinction between those offenses which may be considered political in exceptional circumstances. *See supra* note 300.

³⁰³This position was advocated by this writer at Congressional hearings on the Act. *See Senate Judiciary Hearings on S. 1639, supra* note 3, at 20; *House Judiciary Hearings on H.R. 5227, supra* note 4, at 105-106; *House Foreign Affairs Hearings on H.R. 6046, supra* note 27. *See also* 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 2, pp. 1-106; VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION, *supra* note 39. H.R. 3347 approximates this approach more than previous versions of the Act. *See supra* note 300.

³⁰⁴*Id.*

In determining whether an act constitutes a relative political offense, four factors should be taken into account: (1) the degree of the actor's political involvement in the ideology or movement on behalf of which he has acted, his personal commitment to and belief in the cause on behalf of which he has acted, and his personal conviction that the means (the crime) are justified or necessitated by the objectives and purposes of the ideological or political cause; (2) the existence of a link between the political motive (as expressed above) and the crime committed; (3) the proportionality or commensurateness of the means used (the crime and the manner in which it was performed) in relationship to the political purpose, goal, or objective to be served; and (4) whether the relator's political motives and goals predominate over his intention to commit the common crime.³⁰⁶ These criteria embody the jurisprudence of the United States on the political offense exception,³⁰⁷ but both the Senate and House versions seem to ignore the need for simplicity, clarity, and preservation of basic human rights, protections which, when abused, may leave the individual no other recourse than to engage in an act of violence and thus be extraditable.

International crimes are the exception to the political offense exception they are extraditable offenses which are not to benefit from the political offense exception.³⁰⁸ But the question still arises as to whether or not there are some "exceptional circumstances" (as the House version describes it) which would warrant exclusion. International crimes are offenses against the Law of Nations or *delicti jus gentium* and by their very nature affect the world community as a whole. As such, they should fall within the political offense exception because, even though they may be politically connected, they are in derogation to international law.³⁰⁹

International crimes are those declared to be so, explicitly or implicitly, in multilateral international conventions. At present these crimes are: aggression, war crimes, unlawful use of weapons, genocide, crimes against humanity, *apartheid*, crimes relating to international air communications, threat and use of force against internationally protected persons, taking of hostages, unlawful use of the mails, drug offenses, falsification and counterfeiting, theft of national and archaeological treasures, bribery of foreign public officials, interference with submarine cables, and international traffic in obscene publications.³¹⁰ Theoretically, international crimes are excluded from the political offense exception irrespective of the circumstances under which they occurred, but it certainly can be conceived that under certain circumstances they could be subject to some special consideration. One such example is where an individual is persecuted for political, racial or religious reasons and his life or liberty is in

³⁰⁶See *Eain v. Wilkes*, 641 F.2d 504. See also H.R. 3347, *supra* note 300.

³⁰⁷See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 2, pp. 1-19.

³⁰⁸See *supra* note 303.

³⁰⁹*Id.* See also Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

³¹⁰See BASSIOUNI, INTERNATIONAL CRIMINAL CODE, *supra* note 12, at 52-106.

serious jeopardy, and such individual by seeking to escape commandeers an aircraft without causing risk or harm to others. Should that type of situation, which could technically be labelled hijacking, receive some consideration excluding it from the exception to the exception? The Senate version makes no such consideration, while the House version does.

History teaches us that certain regimes at times create conditions which are so depravatory of minimum standards of human rights that a person subjected to such conditions has no alternative but to seek redress or even escape by means of some violent conduct. Under the legislation, such persons subjected to these conditions would not benefit from the political offense exception and would be returned to the requesting state where they are likely to be subjected to prosecution.

Only those international crimes embodied in treaties ratified by the United States come under this category in the Act. In addition, both bills provide that except in extraordinary circumstances, a violent act shall not constitute a political offense if it is "an offense with respect to which a treaty obligated the United States to either extradite or prosecute a person accused of the offense." The offense of war crimes — i.e., grave breaches of the Geneva Conventions of August 12, 1949³¹¹ — are not included in the enumerated exceptions, but should have been. Such offenses could be interpreted as within the ambit of this subsection, because the United States is a party to the Geneva Conventions, which obligate the United States to prosecute or extradite individuals who have committed grave breaches of the Conventions. To avoid unnecessary ambiguity, a specific statement should have been made to exclude such violations, namely: "grave breaches of the Geneva Conventions of August 12, 1949 and any amendments thereto to which the United States may become a party."³¹²

Prescinding from certain aspects of the customary law of armed conflicts,³¹³

³¹¹Geneva Conventions of August 12, 1949:

- No. I, For the Amelioration of the Wounded and Sick in the Armed Forces of the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31;
- No. II, For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85;
- No. III, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135;
- No. IV, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

³¹²The reference to "amendments to the Geneva Conventions" is to provide for the United States' eventual ratification of the Protocols Additional to the Geneva Conventions of August 12, 1949, June 10, 1977, U.N. Doc. A/32/144 (1977).

³¹³Hague Conventions of October 18, 1907: Convention (I) for the Pacific Settlement of International Disputes, 3 Martens Nouveau Recueil (3d) 360, 36 Stat. 2199, T.S. No. 536; Convention (II) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 3 Martens Nouveau Recueil (3d) 414, 36 Stat. 2241, T.S. No. 537; Convention (III) relative to the Opening of Hostilities, 3 Martens Nouveau Recueil (3d) 437, 36 Stat. 2259, T.S. No. 538; Convention (IV) respecting the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (3d) 461, 36 Stat. 2277, T.S. No. 539; Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 3 Martens Nouveau Recueil (3d) 504, 36 Stat. 2310, T.S. No. 540; Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 3 Martens Nouveau Recueil (3d) 533; Convention (VII) relating to the

the Geneva Conventions of August 12, 1949 differentiate between various levels of hostilities and distinguish between two general types of hostilities: international armed conflicts, and non-international armed conflicts (i.e., internal conflicts).

Under the Conventions, acts of violence committed in the context of international armed conflicts cannot be considered political crimes for which extradition may be denied through the application of the political offense exception. Instead, violent acts in this context are either justified and therefore not criminal, or they are unjustifiable and are grave breaches or war crimes for which extradition or prosecution is required. Whether the violent act is to be deemed a crime depends on whether the act violated the terms of the Geneva Conventions. If the act of violence conforms to the requirements of the Conventions, it is not a crime. Thus, extradition of an individual who has committed such an act cannot be granted because it is justifiable under international law and, therefore, could not be a crime under United States law, so the requirement of dual criminality, section 3194, would not be fulfilled.

Acts of violence which are committed in the contexts of internal conflict, on the other hand, may be considered within the scope of the political offense exception. These contexts include internal armed conflicts and internal civil strife.

Acts of violence committed in the context of internal armed conflicts are regulated by Common Article 3 of the Geneva Conventions. This article prohibits acts such as killing, torturing, or taking hostage individuals who are not actively engaged in the armed conflict such as the wounded, sick, shipwrecked, and civilians. Article 3 does not provide that such acts are to be considered criminal acts, nor does it provide that other acts of violence are to be deemed justifiable. Instead, it leaves this determination to states' application of their national criminal laws and to their definitions of the political offense exception in extradition treaties.³¹⁴ Thus, the political offense exception becomes relevant when an act of violence which does not violate Article 3 has been committed. Because the United States is a party to the Geneva Conventions, the Act should have been drafted so that it was consistent with these Conventions.

Conversion of Merchant Ships into War-Ships, 3 Martens Nouveau Recueil (3d) 557; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 3 Martens Nouveau Recueil (3d) 580, 36 Stat. 2332, T.S. No. 541; Convention (IX) concerning Bombardment by Naval Forces in Time of War, 3 Martens Nouveau Recueil (3d) 604, 36 Stat. 2351, T.S. No. 542; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1907, 3 Martens Nouveau Recueil (3d) 630, 36 Stat. 2371, T.S. No. 543; Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 3 Martens Nouveau Recueil (3d) 663, 36 Stat. 2396, T.S. No. 544; Convention (XII) relative to the Creation of an International Prize Court, 3 Martens Nouveau Recueil (3d) 688; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 3 Martens Nouveau Recueil (3d) 713, 36 Stat. 2415, T.S. No. 545; Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 3 Martens Nouveau Recueil (3d) 745, 36 Stat. 2439, T.S. No. 546.

³¹⁴See, e.g., Veuthey, *Some Problems of Humanitarian Law in Non-International Conflicts and Guerrilla Warfare*, in 1 BASSIOUNI & NANDA, *INTERNATIONAL CRIMINAL LAW*, *supra* note 12, at 422; Veuthey, *Les Conflicts Armes de Caractere Non International et le Droit Humanitaire*, in *CURRENT PROBLEMS OF INTERNATIONAL LAW* 179 (E. Cassese ed. 1975).

It should provide that extraordinary circumstances include those situations wherein an act of violence has been committed in the course of an internal armed conflict, as provided under Common Article 3 to the Geneva Conventions of August 12, 1949, and is deemed permissible under the terms of these Conventions.

Acts of violence which are committed during periods of civil strife are not regulated by the Geneva Conventions. Instead, they are regulated solely by national criminal laws and are therefore subject to the existing meaning of the section's exceptions to the political offense exception. Thus, the Act's treatment of the political offense exception is inadequate. The Senate version provides for the purely political offense exception only by implication, and eliminates entirely the relative political offense when connected with a crime of violence. This is, with the exception of totalitarian regimes, one of the most restrictive legislative formulations in the world,³¹⁵ and was severely criticized by almost every witness before the Senate³¹⁶ and House³¹⁷ except for government representatives,³¹⁸ and, of course those witnesses suggested by them.³¹⁹ As to international crimes, they too are entirely excluded from consideration as a political offense exception in the Senate version and the later House version, but included in the House version under the condition that it be due to extraordinary circumstances.³²⁰ The House bill does not define "extraordinary circumstances," leaving the definition open for future jurisprudential development which, by examining the House legislative interpretation, would not change existing judicial standards.³²¹

2. The Lapse of Statute of Limitations

Although the House bill provides for the defense of the statute of limitations, the Senate version limits the defenses available to those enumerated in the treaty. Nevertheless, it can be presumed that if the applicable treaty does not specify a particular defense, the courts could rely on scattered precedents

³¹⁵*Id.* On the "relative political offense" exception generally, see VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION*, *supra* note 39, at 108-11.

³¹⁶*See Senate Foreign Relations Hearings on S. 1940, supra* note 20.

³¹⁷*See House Judiciary Hearings on H.R. 5227, supra* note 4, at 49 (testimony of D. Carliner, International Human Rights Law Group); *id.* at 64 (testimony of R. Falk, Princeton University School of Law); *id.* at 71 (testimony of W. Henderson, ACLU); *id.* at 85 (testimony of W. Goodman, Topel & Goodman); *id.* at 98 (testimony of M. C. Bassiouni, DePaul University College of Law); *id.* at 108 (testimony of S. Lubet, Northwestern University School of Law); *id.* at 141 (testimony of K. O'Dempsey, Brehon Law Society, R. Capulong, Alliance for Philippine Concerns); *id.* at 209 (prepared statement of C. Pyle, Mount Holyoke College); *House Foreign Affairs Hearings on H.R. 6046, supra* note 26.

³¹⁸*See Senate Judiciary Hearings on S. 1639, supra* note 3, at 2, 4, 8, 14 (testimony of M. Abbell, Dep't of Justice; D. McGovern, Dep't of State); *House Judiciary Hearings on H.R. 5227, supra* note 4, at 26-27 (testimony of R. Olsen and M. Abbell, Dep't of Justice); *id.* at 32 (testimony of D. McGovern, Dep't of State).

³¹⁹*See Senate Judiciary Hearings on S. 1639, supra* note 3, at 30 (testimony of William J. Hannay).

³²⁰*See supra* note 300.

³²¹*See House Judiciary Report on H.R. 6046, supra* note 22, at 23-27.

and follow the emerging contemporary trend of relying on United States law³²² in order to determine the applicability of a particular defense.

3. Double Jeopardy

The Act does not include an explicit provision on the defense of double jeopardy,³²³ failing to recognize jurisprudential holdings that the defense of double jeopardy is validly raised as a bar to extradition when the extradition request is based on the same or substantially the same crime as that for which the relator has been prosecuted, convicted or acquitted.³²⁴ Whether the legal basis of this defense in United States law is found in the eighth amendment or the doctrine of *res judicata*, it embodies the principle *ne bis in idem* recognized in various multilateral conventions.³²⁵

4. Immunity from Prosecution

In addition, the legislation does not take into account current United States case law holding that a relator cannot be extradited if he was granted immunity or entered a negotiated guilty plea with respect to conduct which is the same or substantially the same as the one giving rise to the criminal charge for which extradition is sought. Because constitutional rights supersede obligations under a treaty, extradition in such an instance cannot be granted unless the plea is vacated.³²⁶

XVI. BURDEN OF PROOF

The House version provides for detailed allocation of burden of proof concerning various issues, unlike existing legislation and unlike the Senate version. It places the burden of proving probable cause on the government by a preponderance of the evidence but places the burden of raising a defense on the relator in accordance with Federal Rules of Evidence,³²⁷ if the evidence

³²²See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 5, p. 24.

³²³The House bill contains such a defense implicitly, in that it bars new requests for the "same factual allegation as a previous complaint." See H.R. 3347, *supra* note 8, § 3192(a)(2); H.R. 2643, *supra* note 8, § 3192(a)(2); H.R. 6046, *supra* note 5, § 3192(a)(2); H.R. 5227, *supra* note 2, § 3192(a)(2). This defense is severely weakened, however, by the bill's provision that the Attorney General may nonetheless file such a complaint upon a showing of good cause.

³²⁴See M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 452-59 (1974), relied upon on this issue in *Sindona v. Grant*, 619 F.2d 167, 177-78 (2d Cir. 1980). See also 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 4, pp. 4-12.

³²⁵See, e.g., International Covenant on Civil and Political Rights, December 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, Art. 14(7); American Convention on Human Rights, November 22, 1969, OAS T.S. No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. 2/V/II. 23, doc. 21, rev. 6 (english 1979), Art. 8(4). See also Bassiouni, Hertzberg, Zammuto, *The Protection of Human Rights under International Instruments and National Constitution*, 4 NOUVELLES ETUDES PENALES 57, 84 (IAPL, 1982).

³²⁶See *Santobello v. New York*, 404 U.S. 257; *Geisser v. United States*, 513 F.2d 862 (5th Cir. 1975), *on remand* Petition of Geisser, 414 F. Supp. 49 (S.D. Fla. 1976), *vacated on other grounds* Petition of Geisser, 554 F.2d 698 (5th Cir. 1977); *United States v. Pihakis*, 545 F.2d 973 (5th Cir. 1977); *Scrivens v. Henderson*, 525 F.2d 1263 (5th Cir.), *cert. denied*, 429 U.S. 919 (1976); *Dugan v. United States*, 521 F.2d 231 (5th Cir. 1973).

³²⁷See House Judiciary Report on H.R. 6046, *supra* note 20, at 19.

supports a reasonable belief of the existence of the defense. Thereafter, the burden shifts to the government to disprove the defense, although no standard is provided. The government has the duty to prove the existence of a treaty for which the court is not required to take judicial notice, but no standard is provided. In the Senate version there is no such allocation of the burden of proof except in bail where it rests on the relator to prove, presumably to the satisfaction of the court that special circumstances exist.³²⁸ The House version places the burden of proof for release on the relator.³²⁹ Nothing in the Act refers to the seizure and introduction of evidence in violation of constitutional rights and standards applicable to federal and state criminal proceedings.

XVII. CERTIFICATION OF COURT'S FINDINGS OF EXTRADITABILITY

Unlike existing legislation,³³⁰ the Act requires the court, upon completion of the hearing, to state its reasons for its findings as to each charge or conviction contained in the complaint.³³¹ This is a very laudable provision in that it establishes the basis for the appeal.³³²

Upon a finding of extraditability the court must certify a transcript of the proceedings to the Secretary of State.³³³ Thus, it is not only the court's order, containing an opinion which includes findings of facts and conclusions of law, which must be sent to the Secretary of State, but also a certified copy of the transcript of the entire proceedings.

Under the Senate bill, if the court finds that the relator is not extraditable, it must certify its findings and an appropriate report to the Secretary of State.³³⁴ In this instance, certification of the transcript of the proceedings is not required. Under the House version, the court must certify its findings to the Secretary of State. The House bill accords to the judiciary the discretion to send to the Secretary of State either a transcript of the proceedings or an appropriate report.³³⁵

The House version further provides that the relator can petition the court

³²⁸See S. 220, *supra* note 7, § 3192(d)(1); S. 1940, *supra* note 5, § 3192(d)(1); S. 1639, *supra* note 1, § 3192(d)(1).

³²⁹See H.R. 3347, *supra* note 8, § 3192(d)(2); H.R. 2643, *supra* note 8, § 3192(d)(2); H.R. 6046, *supra* note 5, § 3192(d)(2); H.R. 5227, *supra* note 2, § 3192(d)(2). See *supra* notes 169-84 and accompanying text regarding bail.

³³⁰18 U.S.C. § 3184 (1976) requires only that the court certify its findings and a copy of the transcript to the Secretary of State.

³³¹See S. 220, *supra* note 7, § 3194(f); S. 1940, *supra* note 5, § 3194(f); S. 1639, *supra* note 1, § 3194(f); H.R. 2643, *supra* note 8, § 3194(f); H.R. 3347, *supra* note 8, § 3194(f); H.R. 6046, *supra* note 5, § 3194(f); H.R. 5227, *supra* note 2, § 3194(f).

³³²The provision regarding appeal, Section 3195, is discussed *infra* at notes 339-74 and accompanying text.

³³³See S. 220, *supra* note 7, § 3194(f)(1); S. 1940, *supra* note 5, § 3194(f)(1); S. 1639, *supra* note 1, § 3194(f)(1); H.R. 2643, *supra* note 8, § 3194(f)(1); H.R. 3347, *supra* note 8, § 3194(f)(1); H.R. 6046, *supra* note 5, § 3194(f)(1); H.R. 5227, *supra* note 2, § 3194(f)(1).

³³⁴See S. 220, *supra* note 7, § 3194(e)(2); S. 1940, *supra* note 5, § 3194(e)(2); S. 1639, *supra* note 1, § 3194(e)(2).

³³⁵See H.R. 3347, *supra* note 8, § 3194(f)(2); H.R. 2643, *supra* note 8, § 3194(f)(2); H.R. 6046, *supra* note 5, § 3194(f)(2); H.R. 5227, *supra* note 2, § 3194(f)(2).

to dissolve its order and dismiss the complaint if the Secretary of State does not reach a decision as to his surrender within forty-five days from the date of the Secretary's receipt of the certified order and transcript of proceedings (excluding any delays caused by judicial proceedings).³³⁶ The court is required to grant such a petition "unless the Attorney General shows good cause why such petition should not be granted."³³⁷

The Senate bill contains a somewhat different provision regarding limitations on detention pending removal. It states that the relator may petition the court for his release, but not a dissolution of the court's order and a dismissal of the complaint, if "the Secretary of State does not order the person's surrender, or declines to order the person's surrender, within forty-five days after [the Secretary's] receipt of the court's findings and the transcript of the proceedings"³³⁸

In effect this is another statutory provision akin to a right to a speedy trial, though in this case it is after adjudication. It is mandatory and not peremptory, which means that the release by virtue of petition for dissolution of the order can be automatically granted, unless the court grants the Secretary of State a reasonable extension of time to achieve the surrender or good cause is shown. This provision places a higher burden on the Secretary of State to effectuate the transfer even though in some instances the circumstances may be beyond the control of the Secretary. The court may, of course, grant the Secretary a reasonable extension of time. A problem with this provision is that it does not allow the Secretary enough time to take into account considerations within his executive discretion such as matters pertaining to conditional extradition and other humanitarian factors or political factors (stated specifically in other sections of the Act in addition to his general authority under constitutional executive discretion), nor does it allow enough time for the Secretary of State to conclude negotiations on these matters with the appropriate governments.

XVIII. REVIEWABILITY

Unlike existing legislation which does not provide for appeals, the Act in section 3195 provides that review of extradition decisions are by means of an appeal.³³⁹ This is a novel feature of the Act. What is meant by review is, of course, a decision by the judiciary after a hearing with findings holding that the requested person is extraditable. Whereas under existing jurisprudence, review is limited to a petition for a writ of *habeas corpus*, this section establishes

³³⁶H.R. 3347, *supra* note 8, § 3194(i); H.R. 2643, *supra* note 8, § 3194(i); H.R. 6046, *supra* note 5, § 3194(i); H.R. 5227, *supra* note 2, § 3194(i).

³³⁷*Id.*

³³⁸S. 220, *supra* note 7, § 3196(c); S. 1940, *supra* note 5, § 3196(c); S. 1639, *supra* note 1, § 3196(c).

³³⁹S. 220, *supra* note 7, § 3195; S. 1940, *supra* note 5, § 3195; S. 1639, *supra* note 1, § 3195; H.R. 3347, *supra* note 8, § 3195; H.R. 2643, *supra* note 8, § 3195; H.R. 6046, *supra* note 5, § 3195; H.R. 5227, *supra* note 2, § 3195.

appeal for the relator and for the government as a matter of right, and thus purports to exclude *habeas corpus* as a means for review. Constitutional requirements however stand in the way of excluding *habeas corpus* entirely.³⁴⁰ The legislative intent is to achieve three objectives: (1) to afford the government a right of appeal; (2) to exclude *habeas corpus*; and (3) to expedite the review process.³⁴¹

The section gives the government an opportunity it did not have in the past to have a decision of non-extraditability reconsidered.³⁴² The Senate bill specifies that the appeal is to be taken in accordance with Federal Rules of Appellate Procedure 3 and 4(b).³⁴³ The House version provides simply that the

³⁴⁰U.S. CONST., art. 1, § 9, cl. 2: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." See also House Judiciary Report on H.R. 6046, *supra* note 23, at 29.

³⁴¹See Senate Judiciary Report, *supra* note 15, at 17-19; House Judiciary Report, *supra* note 23, at 28-29.

³⁴²See Matter of Mackin, 668 F.2d 122 (2d Cir. 1981). See also Senate Judiciary Report on S. 1940, *supra* note 15, at 17-19.

³⁴³S. 220, *supra* note 7, § 3195(a); S. 1940, *supra* note 5, § 3195(a); S. 1639, *supra* note 1, § 3195(a) state: IN GENERAL. — Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

FED. R. APP. P. 3 and 4(b) provide:

Rule 3.

APPEAL AS OF RIGHT — HOW TAKEN

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

Rule 4

APPEAL OF RIGHT — WHEN TAKEN

...

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall

Federal Rules of Appellate Procedure applicable to criminal cases shall apply, without specification to particular rules.³⁴⁴ It is interesting to note once more how the Act brings extradition proceedings within the fold of criminal proceedings, though it goes to great lengths in its provisions as well as in the legislative history to assert that extradition proceedings are *sui generis* and are not in the nature of criminal proceedings.³⁴⁵

The section provides that an appeal is initiated by way of a notice of an appeal.³⁴⁶ Both versions of the Act require that the appeal is to be heard "as soon as practicable"³⁴⁷ after the filing of such notice. The House bill, in addition, requires that the appeal is to be heard "promptly" when the relator has not been released pending determination of the appeal.³⁴⁸ These requirements that the appeal be held on an expedited basis indicate the legislative intent that the extradition process be handled in a swifter manner than it has been heretofore.³⁴⁹

Both the Senate and House bills provide for the relator's release pending the appeal.³⁵⁰ Generally, if the relator was found extraditable by the lower court, he cannot be released unless he satisfies specified criteria.³⁵¹ If he is found not

be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after each entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The Senate Judiciary Committee noted in its Report that other federal rules of appellate procedure should also apply to matters such as briefing, oral argument, etc. See Senate Judiciary Report on S. 1940, *supra* note 15, at 18.

³⁴⁴See H.R. 3347, *supra* note 8, § 3195(a)(1); H.R. 2643, *supra* note 8, § 3195(a)(1); H.R. 6046, *supra* note 5, § 3195(a)(1); H.R. 5227, *supra* note 2, § 3195(a)(1). The House Judiciary Committee made no further specification of which rules should apply. See House Judiciary Report on H.R. 6046, *supra* note 23, at 28.

³⁴⁵See *supra* notes 215 and 216.

³⁴⁶See S. 220, *supra* note 7, § 3195(a); S. 1940, *supra* note 5, § 3195(a); S. 1639, *supra* note 1, § 3195(a); H.R. 3347, *supra* note 8, § 3195(a)(2); H.R. 2643, *supra* note 8, § 3195(a)(2); H.R. 6046, *supra* note 5, § 3195(a)(2); H.R. 5227, *supra* note 2, § 3195(a)(2).

³⁴⁷*Id.*

³⁴⁸H.R. 3347, *supra* note 8, § 3195(a)(5); H.R. 2643, *supra* note 8, § 3195(a)(4); H.R. 6046, *supra* note 5, § 3195(a)(4); H.R. 5227, *supra* note 2, § 3195(a)(4).

³⁴⁹See Senate Judiciary Report on S. 1940, *supra* note 15, at 19; House Judiciary Report on H.R. 6046, *supra* note 23, at 29.

³⁵⁰See S. 220, *supra* note 7, § 3195(b); S. 1940, *supra* note 5, § 3195(b); S. 1639, *supra* note 1, § 3195(b); H.R. 3347, *supra* note 8, § 3195(a)(3); H.R. 2643, *supra* note 8, § 3195(a)(3); H.R. 6046, *supra* note 5, § 3195(a)(3); H.R. 5227, *supra* note 2, § 3195(a)(3).

³⁵¹S. 220, *supra* note 7, § 3195(b)(1); S. 1940, *supra* note 5, § 3195(b)(1); S. 1639, *supra* note 1, § 3195(b)(1); H.R. 3347, *supra* note 8, § 3195(a)(3)(A); H.R. 2643, *supra* note 8, § 3195(a)(3)(A); H.R. 6046, *supra* note 5, § 3195(a)(3)(A).

extraditable by the lower court, however, he is to be released unless the Attorney General satisfies specified criteria.³⁵² The two versions of the Act differ on these applicable criteria.

Under the Senate bill, if the relator was found extraditable by the lower court, he will be held in detention unless he can demonstrate special circumstances.³⁵³ Under the House bill, if the relator was found extraditable by the lower court and the appeal has been taken by either party, he will be held in detention unless he can demonstrate by a preponderance of the evidence that: (1) he "does not present a substantial risk of flight"; (2) he "does not present a danger to any other person or the community"; (3) "no relationship with a foreign state will be jeopardized with respect to a treaty concerning extradition"; and (4) the probability of success of his appeal is "great."³⁵⁴

If the relator is found not extraditable by the lower court, the Senate version provides that he is to be released pending the appeal "unless the court is satisfied that [he] is likely to flee or endanger the safety of any other person or the community."³⁵⁵ In this instance, the court is also directed to "impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community."³⁵⁶ The House bill states that if the relator was found not extraditable by the lower court and if the appeal is brought by the government, the relator is to be released unless the government shows by a preponderance of the evidence that the relator, if released: (1) presents a substantial risk of flight; (2) presents a danger to any other person or the community; (3) will jeopardize a relationship with a foreign state with respect to a treaty concerning extradition; and (4) that the probability of success of the government's appeal is great.³⁵⁷

³⁵²S. 220, *supra* note 7, § 3195(b)(2); S. 1940, *supra* note 5, § 3195(b)(2); S. 1639, *supra* note 1, § 3195(b)(2); H.R. 3347, *supra* note 8, § 3195(a)(3)(B); H.R. 2643, *supra* note 8, § 3195(a)(3)(B); H.R. 6046, *supra* note 5, § 3195(a)(3)(B); H.R. 5227, *supra* note 2, § 3195(a)(3)(B).

³⁵³S. 220, *supra* note 7, § 3195(b)(1); S. 1940, *supra* note 5, § 3195(b)(1); S. 1639, *supra* note 1, § 3195(b)(1). The Senate Judiciary Report stressed its desire that

this authority to release a fugitive on bail will be utilized even more sparingly than the power to grant bail before the extradition hearing, and only after the most thorough and searching examination of the claimed need for release. It is expected that the courts of appeal will keep in mind that "no amount of money could answer the damage that would be sustained by the United States if [the fugitive] were to be released on bond, flee the jurisdiction, and be unavailable to surrender . . ."

Senate Judiciary Report on S. 1940, *supra* note 15, at 18-19, quoting *Jimenez v. Aristequieta*, 314 F.2d 649. Although the Report does not cite to the particular page on which the quoted material appears in *Jimenez*, it can be found on page 653 of the court's opinion.

³⁵⁴H.R. 2643, *supra* note 8, § 3195(a)(3)(A); H.R. 6046, *supra* note 5, § 3195(a)(3)(A). H.R. 3347, *supra* note 8, § 3195(a)(3)(A) deletes the requirement that the relator prove that no U.S. treaty relationship will be jeopardized. Instead, the bill provides in subsection (a)(4) that the court consider this factor in making its determination of release. The original House bill, H.R. 5227, simply stated that the relator should be held pending appeal if the Attorney General, upon motion, proved that the relator presented a risk of flight or posed a danger on appeal, and that the problem of success in appeal was great. See H.R. 5227, *supra* note 2, § 3195(a)(3). The provision did not place upon the relator any burden of proving that release was appropriate.

³⁵⁵S. 220, *supra* note 7, § 3195(b)(2); S. 1940, *supra* note 5, § 3195(b)(2); S. 1639, *supra* note 1, § 3195(b)(2).

³⁵⁶*Id.*

³⁵⁷H.R. 2643, *supra* note 8, § 3195(a)(3)(B); H.R. 6046, *supra* note 5, § 3195(a)(3)(B). H.R. 3347 does not require proof that release will jeopardize a U.S. treaty relationship. See *supra* note 354.

Both versions of the Act provide that the circuit court of appeals shall have jurisdiction to review on appeal all matters pertaining to extraditability.³⁵⁸ Thus the appellate courts can consider whether or not the lower court had subject matter jurisdiction to conduct an extradition hearing, whether or not the lower court had *in personam* jurisdiction over the relator, whether or not there is a treaty currently in force which applies to the request for extradition, and whether or not the crime charged falls within the terms of the applicable treaty. These issues are all presently considered under *habeas corpus* review.³⁵⁹ The new direct appellate procedure should not change their reviewability, including the review of the lower court's determination of the existence of probable cause to believe that the relator has committed the crime charged and the sufficiency of the evidence.

Under the existing standard of *habeas corpus* review, stated in *Fernandes v. Phillips*, a magistrate's finding of probable cause will not be overturned if there is "any evidence" in the record which supports that finding.³⁶⁰ Under the Act when an appellate court considers the probable cause issue on direct appeal, the standard of review applicable to all warrant cases will be used, and a magistrate's finding of probable cause will be given "great deference."³⁶¹ The change in reviewing standard is not evidenced by the differing verbal formulation, but by the more searching appellate examination of probable cause found in cases raising the question in the context of the fourth amendment³⁶² rather than the extradition context.³⁶³ Presumably such matters are limited to questions of law though there will inevitably be some mixed questions of law and fact. The Federal Rules of Appellate Procedure and the jurisprudence of United States courts concerning reviewability of issues on appeal in criminal cases will likely be controlling.³⁶⁴

While purporting to restrict reviewability by means of petitions for *habeas*

³⁵⁸See S. 220, *supra* note 7, § 3195(a); S. 1940, *supra* note 5, § 3195(a); S. 1639, *supra* note 1, § 3195(a); H.R. 3347, *supra* note 8, § 3195(a)(1); H.R. 2643, *supra* note 8, § 3195(a)(1); H.R. 6046, *supra* note 5, § 3195(a)(1); H.R. 5227, *supra* note 2, § 3195(a)(1). In addition, both bills provide that the district court shall stay its order pending the appeal. S. 220, *supra* note 7, § 3195(a); S. 1940, *supra* note 5, § 3195(a); S. 1639, *supra* note 1, § 3195(a); H.R. 3347, *supra* note 8, § 3195(a)(2); H.R. 2643, *supra* note 8, § 3195(a)(2); H.R. 6046, *supra* note 5, § 3195(a)(2); H.R. 5227, *supra* note 2, § 3195(a)(2).

³⁵⁹*Fernandez v. Phillips*, 268 U.S. at 312; *Valencia v. Limbs*, 655 F.2d at 197; *Antunes v. Vance*, 640 F.2d at 4-5; *In re Assarsson*, 635 F.2d at 1240-41.

³⁶⁰*Fernandez v. Phillips*, 268 U.S. at 312. The phrase "finding of probable cause," although commonly used, is misleading since the existence of probable cause is not a finding of fact, but rather a legal judgment which is made based upon certain facts which are found or allegations which are accepted as true.

³⁶¹*Spinelli v. United States*, 393 U.S. at 419.

³⁶²See, e.g., *Fernandez v. Phillips*, 268 U.S. at 312; *Valencia v. Limbs*, 655 F.2d at 197; *Antunes v. Vance*, 640 F.2d at 4-5.

³⁶³See, e.g., *Eain v. Wilkes*, 641 F.2d at 407-08; *Antunes v. Vance*, 640 F.2d at 4-5; *Escobedo v. United States*, 623 F.2d at 1102; *Brauch v. Raiche*, 618 F.2d at 854; *Hooker v. Klein*, 573 F.2d at 1367, 1369; *Jhirad v. Ferrandina*, 536 F.2d at 485.

³⁶⁴See generally FED. R. APP. P. 3, 4(b) (standards and notice of appeal); FED. R. CRIM. P. 52 (harmless error and plain error); FED. R. CIV. P. 15 (findings by district court will not be set aside unless clearly erroneous).

corpus, the Act does not entirely preclude it if "the grounds for the petition or other review could not previously have been presented."³⁶⁵ In this respect it is assumed that federal rules and the court's interpretation thereof concerning petitions for *habeas corpus* would apply as with other criminal cases.³⁶⁶ The House version provides for an additional ground for *habeas corpus*, if "the court finds good cause existed for not taking the appeal."³⁶⁷ The House bill does not define "good cause"; presumably the analogy to criminal cases would be appropriate.³⁶⁸ The second ground concerns issues that have not been presented on appeal or have been discovered subsequently.

Habeas corpus petitions will also be the means resorted to for challenging probable cause for arrest and bail prior to the extradition hearing.³⁶⁹ As a result, the legislation's provision will unduly lengthen extradition proceedings by allowing for an appeal which concededly benefits the government, to which *habeas corpus* proceedings will be added.

The Act does not discuss any post-trial motions which exist under the Federal Rules of Criminal Procedure,³⁷⁰ and it is unclear what the courts might do about their applicability.³⁷¹ Surely there are sufficient references to these rules in the legislation and its history for the court to find authority to fill the gap between the hearing's order and the appeal.³⁷² On the other hand the courts may apply the construction rule *expressio unius est exclusio alterius*.³⁷³ Under the House version, the Supreme Court could resolve this problem under its rule-making authority stated in section 3199(f).³⁷⁴

XIX. EXECUTIVE DISCRETION TO DENY EXTRADITION

The Act unlike existing legislation³⁷⁵ specifically provides for executive

³⁶⁵S. 220, *supra* note 7, § 3195(c); S. 1940, *supra* note 5, § 3195(c); S. 1639, *supra* note 1, § 3195(c); H.R. 3347, *supra* note 8, § 3195(b)(2); H.R. 2643, *supra* note 8, § 3195(b)(2); H.R. 6046, *supra* note 5, § 3195(b)(2); H.R. 5227, *supra* note 2, § 3195(b)(2).

³⁶⁶See *supra* notes 362-64.

³⁶⁷H.R. 3347, *supra* note 8, § 3195(b)(2); H.R. 2643, *supra* note 8, § 3195(b)(2); H.R. 6046, *supra* note 5, § 3195(b)(2); H.R. 5227, *supra* note 2, § 3195(b)(2).

³⁶⁸The House Judiciary Committee offered no specification in this regard. See House Judiciary Report on H.R. 6046, *supra* note 23, at 29. Given the Committee's numerous references to criminal jurisprudence and legislation in other sections where clarification was offered, it is likely the Committee intended such an analogy.

³⁶⁹On the necessity of probable cause to arrest prior to the extradition hearing, see *supra* notes 151-68 and accompanying text.

³⁷⁰See, e.g., FED. R. CRIM. P. 33 (after trial by court without jury, upon motion of defendant, district court may vacate judgment, hear additional evidence, and enter new judgment); Rule 34 (motion in arrest of judgment to contest jurisdiction); Rule 36 (motion to correct clerical mistake).

³⁷¹Neither the Senate or House Judiciary Report considered the question.

³⁷²See *supra* notes 215 and 216.

³⁷³"That which is explicitly stated excludes anything else by implication." For the application of this rule in the interpretation of extradition treaties, see 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. II, § 4, pp. 25-26.

³⁷⁴This section is discussed *infra* at note 421 and accompanying text.

³⁷⁵Current legislation contains no provision for executive discretion to deny extradition. Such discretion is currently derived from the executive's constitutional authority to direct foreign affairs, in U.S. CONST., art. II, § 2.

discretion to deny a foreign state's extradition request if either: (1) the foreign state is seeking extradition in order to prosecute or punish the requested individual because of his political opinions, race, religion, or nationality;³⁷⁶ or (2) the relator's extradition would be incompatible with humanitarian considerations.³⁷⁷ Such executive discretion is to be exercised by the Secretary of State and is not subject to judicial review. The Act thus specifically formalizes executive discretion even though such discretion is within the executive's constitutional authority in that it is a matter of foreign relations.³⁷⁸

These provisions are complementary to the rule of non-inquiry, recognized in the United States through judicial case law. The rule of non-inquiry requires that the extradition judge or magistrate cannot inquire into the political motives of the requesting state and the punishment to which the relator may be subjected upon return.³⁷⁹ The inclusion of such provisions, however, creates anomalies in United States law which could lead to incongruous or unjust results.

Both the Senate and House bills contain identical provisions that the Secretary of State has the discretion to determine whether a requesting state is seeking extradition for the purpose of prosecuting or punishing a person because of "such person's political opinions, race, religion, or nationality."³⁸⁰ Such a decision is nonreviewable under the Administrative Procedure Act.³⁸¹ The content of such a judgment and its application to a person about whom such a decision is to be made are the same as under the terms of the 1967 Protocol Amending the 1951 Refugee Convention,³⁸² which is embodied in the 1980 Refugee Act.³⁸³ However, the language of the Act is different from that of

³⁷⁶S. 220, *supra* note 7, § 3196(a)(3)(A); S. 1940, *supra* note 5, § 3194(g)(i); S. 1639, *supra* note 1, § 3196(a); H.R. 2643, *supra* note 8, § 3194(e)(4)(A); H.R. 6046, *supra* note 5, § 3194(e)(3)(A); H.R. 5227, *supra* note 2, § 3194(e)(1)(A). The earlier Senate bill included this provision in its section regarding the hearing rather than its section regarding surrender. H.R. 3347 permits the court to deny a relator's extradition on these grounds. See *supra* note 300.

³⁷⁷S. 220, *supra* note 7, § 3196(a)(3)(B); S. 1940, *supra* note 5, § 3194(g)(2); S. 1639, *supra* note 1, § 3194(a); H.R. 2643, *supra* note 8, § 3194(e)(4)(B); H.R. 6046, *supra* note 5, § 3194(e)(3)(B); H.R. 5227, *supra* note 2, § 3194(e)(3)(B). The Senate version also required that in determining these issues the Secretary of State consult with the Department of State, including the Bureau of Human Rights and Humanitarian Affairs. S. 220, *supra* note 7, § 3196(a); S. 1940, *supra* note 5, § 3194(g)(3). The earlier Senate version provided for these matters in its section regarding the hearing rather than its section regarding surrender. See S. 1940, *supra* note 5, § 3194(g)(3). H.R. 3347 permits the court to deny a relator's extradition on these grounds. See *supra* note 300.

³⁷⁸U.S. CONST., art. II, § 2.

³⁷⁹See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 7.

³⁸⁰S. 220, *supra* note 7, § 3196(a)(1); S. 1940, *supra* note 5, § 3194(g)(1); S. 1639, *supra* note 1, § 3194(a)(2); H.R. 2643, *supra* note 8, § 3194(a)(4)(A); H.R. 6046, *supra* note 5, § 3194(e)(3)(A); H.R. 5227, *supra* note 2, § 3194(3)(a)(A).

³⁸¹5 U.S.C. §§ 701 *et seq.* (1976). The Senate bill states that the Secretary's decision is "a matter solely within the discretion of the Secretary and is not subject to judicial review." S. 220, *supra* note 7, § 3196(a). The previous Senate version differed slightly, in that it provided that the Secretary's decision is "final" rather than "a matter solely within the discretion of the Secretary." See S. 1940, *supra* note 5, § 3194(g)(1). The House bill contains no explicit provision for the finality and reviewability of the Secretary's discretion.

³⁸²Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

³⁸³8 U.S.C. § 1101. For an in-depth study, see TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES (1982 Michigan Yearbook of Int'l Legal Studies).

the 1967 Protocol and the above-mentioned United States legislation,³⁸⁴ and this diversity could produce conflicting judicial and administrative results. Furthermore, the procedures established under the 1980 Refugee Act³⁸⁵ provide for procedures under the Immigration and Nationality Act³⁸⁶ and the Immigration and Naturalization Service which precede the use of discretion by the Secretary of State.

Since there is already an established procedure for the determination of whether an individual is entitled to be considered a political refugee consistent with international treaty obligations, it would have been preferable if the Act had adopted the same substantive requirements and procedures set forth in other United States legislation. Then, rather than having the Secretary of State decide the issue at his discretion, after the court decides on the relator's extraditability without considering his claim to status as a political refugee, the court could direct the relator to file for political asylum under the 1980 Refugee Act. The court would then withhold the final surrender order pending the determination of the Immigration and Nationality Service of whether the individual were entitled to be considered a political refugee within the meaning of United States law. If he were deemed eligible for the status of political refugee, then the surrender order would not be issued; the order of extraditability would have been reopened and a finding of non-extraditability entered. If he were found ineligible for the status, the court could issue the surrender order. There was no need for any additional language in the Act to confer discretion upon the Secretary of State, since he can rely on executive discretion to refuse surrender of a person certified extraditable by the courts.³⁸⁷

In addition, the bills provide that only the Secretary of State in his own, unreviewable discretion may deem that the return of a relator to a requesting state is "incompatible with humanitarian considerations."³⁸⁸ This provision

³⁸⁴The Refugee Act provides the following definition of "refugee":

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The Refugee Act, Pub. L. No. 96-212, Title II, § 201(a), 94 Stat. 102 (1980), *codified at* 8 U.S.C. § 1101(a)(42)(A).

³⁸⁵*Id.* at §§ 208 (asylum), 209 (adjustment of status), 94 Stat. 105-06, *codified at* 8 U.S.C. §§ 1158, 1159. See 8 C.F.R. § 208.10 (asylum procedures). The Act specifically states that "the Attorney General *shall not* deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 203(e), *codified at* 8 U.S.C. § 1253(h) [emphasis added].

³⁸⁶8 U.S.C. §§ 1100 *et seq.* (1976).

³⁸⁷See M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 531-34 (1974). These observations were made by this writer at hearings on S. 1639, H.R. 5227, and H.R. 6046. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 20-25; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 105-06; *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 27.

³⁸⁸See S. 220, *supra* note 7, § 3196(a)(3)(B); S. 1940, *supra* note 5, § 3194(g)(2); S. 1639, *supra* note 1, § 3194(a); H.R. 2643, *supra* note 8, § 3194(e)(4)(B); H.R. 6046, *supra* note 5, § 3194(e)(3)(B); H.R. 5227, *supra* note 2, § 3194(e)(1)(B).

is in keeping with long-standing United States practice that the court not inquire into the prospective treatment that a relator may face upon return to a requesting state.³⁸⁹ It is to be noted, however, that certain practices of corporal punishment or cruel and inhuman punishment are contrary to United States public policy as well as contrary to internationally protected norms of human rights.³⁹⁰ To specifically state that discretion is given the Secretary of State to make such determinations (although he has such executive discretion) might place the United States in a position of embarrassment *vis a vis* a foreign government and could burden relations between the United States and that government.

At hearings before the House Foreign Affairs Committee on H.R. 6046, this writer suggested three procedures that would shield the United States government from having to make such decisions which may impair its foreign relations with such a state.³⁹¹ The first procedure is to condition extradition in certain cases to the non-applicability of such treatment or punishment which would be contrary to United States law and policy and internationally protected human rights norms. The analogy in this case is to the practice of a number of states which prohibit extradition where the death penalty may be imposed.³⁹² It is possible in such instances that the requesting state undertakes not to mete out such a punishment and therefore eliminate the obstacle. The same could be done with respect to corporal punishment, torture, and the like.

The second alternative is to extradite the relator on the condition that upon his conviction he would be returned to the United States as a transferred prisoner so that his sentence would be executed in the United States in accordance with United States law.³⁹³ The third alternative is to deny extradition. The Act in-

³⁸⁹See 1 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VII, § 7. See also *Neely v. Henkel*, 180 U.S. 109 (1901); *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957). But see *Peroff v. Hylton*, 563 F.2d 1099 (4th Cir. 1077); *U.S. ex rel. Bloomfield v. Gengler*, 507 F.2d 295 (2d Cir. 1974); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972); *Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960) (rule of non-inquiry may be relaxed in compelling circumstances). The House Judiciary Report noted that the rule of non-inquiry is "not absolute," and may be relaxed in particularly egregious situations. In support, the Report referred to *Gallina*. See House Judiciary Report on H.R. 6046, *supra* note 23, at 20.

³⁹⁰Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948), article 5; International Covenant on Civil and Political Rights, *entered into force*, March 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316, article 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force*, September 3, 1953, 213 U.N.T.S. 222, E.T.S. No. 5, article 3; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted by* The Ninth International Conference of American States (Mar. 30-May 2, 1948), O.A.S. Off. Rec. OEA/Ser. L/V/II.4 Rev. (1965), article XXVIII; American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, O.A.S. T.S. No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc. 21. rev. 6 (english 1979), article 5.

³⁹¹See *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 27. See also *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 21 (testimony of M. Cherif Bassiouni); *House Judiciary Hearings on H.R. 5227*, *supra*, note 4, at 100, 104-105 (testimony of M. Cherif Bassiouni).

³⁹²See 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at ch. VIII, § 5.

³⁹³See 18 U.S.C. §§ 4107-08 (1976). The inclusion of a provision regarding conditional surrender was suggested by this writer at hearings before the Senate Judiciary Committee on S. 1639. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 23 (testimony of M. Cherif Bassiouni). The provision was added by the Senate Judiciary Committee to S. 1940 and S. 220 and was carried over in H.R. 5227 and H.R. 6046. See S. 220, *supra* note 7, § 3196(a)(2); S. 1940, *supra* note 5, § 3196(a)(2); H.R. 2643, *supra* note 8, § 3196(a); H.R. 6046, *supra* note 5, § 3196(a).

cludes all of the above but the determination is still left to the exclusive discretion of the Secretary of State without judicial inquiry.³⁹⁴ The importance of judicial determination in this case, as in other politically sensitive areas, is that it shields the executive from the political consequences of such a determination when made in the face of a foreign state's extradition request.

XX. SURRENDER OF A PERSON HELD EXTRADITABLE TO A REQUESTING STATE

Both versions of the Act contain similar provisions concerning the procedure for the surrender of an individual found extraditable.³⁹⁵ Both reemphasize the Secretary of State's discretion to extradite, to condition extradition, or to deny extradition, thus embodying statutorily the unreviewable discretionary powers of the Secretary.

The Senate and House bills also clearly state that the Secretary may surrender a national of the United States even though such surrender is not specifically authorized by the applicable extradition treaty.³⁹⁶ The Secretary is denied such authority only where the applicable treaty or where United States laws specifically prohibit it.³⁹⁷

The Act provides that the Secretary of State must notify the person held extraditable, the diplomatic representative of the foreign state, the Attorney General, and the court which ordered the person extraditable of his decision.³⁹⁸ Under the House version, although it is the Secretary who negotiates the surrender and orders it, it is the Attorney General who in accordance with instructions from the Secretary of State performs the actual surrender of custody of the relator to the agent of the requesting government.³⁹⁹ Both versions of the Act contain time limitations for the relator's surrender. Under the Senate bill, the Secretary of State must reach his decision within forty-five days after his receipt of the court's findings and the transcript of the proceedings.⁴⁰⁰ If the Secretary orders the relator's surrender, he must be removed from the United States within thirty days following such order.⁴⁰¹ If either of these time limits

³⁹⁴See *supra* notes 388-90 and accompanying text.

³⁹⁵See S. 220, *supra* note 7, § 3196; S. 1940, *supra* note 5, § 3196; H.R. 3347, *supra* note 8, § 3196; H.R. 2643, *supra* note 8, § 3196; H.R. 6046, *supra* note 5, § 3196; H.R. 5227, *supra* note 2, § 3196.

³⁹⁶S. 220, *supra* note 7, § 3196(a); S. 1940, *supra* note 5, § 3196(a); S. 1639, *supra* note 1, § 3196(a); H.R. 3347, *supra* note 8, § 3196(a); H.R. 2643, *supra* note 8, § 3196(a); H.R. 6046, *supra* note 5, § 3196(a); H.R. 5227, *supra* note 2, § 3196(a).

³⁹⁷*Id.*

³⁹⁸S. 220, *supra* note 7, § 3196(b); S. 1940, *supra* note 5, § 3196(b); S. 1639, *supra* note 1, § 3196(b); H.R. 3347, *supra* note 8, § 3196(b); H.R. 2643, *supra* note 8, § 3196(b); H.R. 6046, *supra* note 5, § 3196(b); H.R. 5227, *supra* note 2, § 3196(b). The Secretary of State must also notify the requesting state of the time limitations for removal if the Secretary has determined that extradition is appropriate.

³⁹⁹H.R. 3347, *supra* note 8, § 3196(b); H.R. 2643, *supra* note 8, § 3196(b); H.R. 6046, *supra* note 5, § 3196(b); H.R. 5227, *supra* note 2, § 3196(b). The Senate makes no specification of who is to perform the surrender.

⁴⁰⁰S. 220, *supra* note 7, § 3196(c)(1); S. 1940, *supra* note 5, § 3196(c)(1); S. 1639, *supra* note 1, § 3196(c)(1).

⁴⁰¹S. 220, *supra* note 7, § 3196(c)(2); S. 1940, *supra* note 5, § 3196(c)(2); S. 1639, *supra* note 1, § 3196(c)(2).

is not satisfied, excluding any delays for judicial proceedings, the relator may petition the court for his release.⁴⁰² The court “may grant this petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.”⁴⁰³

Under the House bill, the Secretary must also reach his decision within forty-five days from his receipt of the court’s findings and the transcript of the proceedings.⁴⁰⁴ The House version, similarly, also requires that surrender, if ordered by the Secretary, must be accomplished within thirty days from such order.⁴⁰⁵ If either of these time limitations is not satisfied, excluding any delays for judicial proceedings, the relator may petition the court for dismissal of the complaint and dissolution of the court’s order of extraditability.⁴⁰⁶ Notice of such petition is to be made to the Secretary of State.⁴⁰⁷ The bill specifies that the court *shall* grant the relator’s petition, “unless the Attorney General shows good cause why such petition should not be granted.”⁴⁰⁸

Both versions of the Act thus provide for an unusual and rather rigid requirement which is in the nature of a sanction imposed upon the requesting state for failure to take custody and remove the relator from the United States. Although both versions state that petitions can be filed by the relator, nothing precludes the government — that is, the Attorney General acting on his own behalf or at the request of the Secretary of State — to petition the court which held the individual extraditable. It is unfortunate that the Act does not define “good cause,” since this is a nebulous standard. The Act also leaves somewhat unclear whether the dismissal or release after thirty days is mandatory or peremptory considering that the Attorney General could oppose it upon a showing of good cause. Furthermore, it is rather unusual that the tolling of the thirty days does not commence upon notice but upon an act which may not be communicated to the party expected to take measures depending upon it. It is also interesting to note that notice of the relator’s petition for dissolution of the extradition order is to be sent to the Secretary of State, without mention of the need to also notify the Attorney General.

Thus, although the Act attempts to allocate roles to the Secretary of State and the Attorney General, it unfortunately is not as clear and comprehensive

⁴⁰²S. 220, *supra* note 7, § 3196(c); S. 1940, *supra* note 5, § 3196(c); S. 1639, *supra* note 1, § 3196(c).

⁴⁰³*Id.*

⁴⁰⁴H.R. 3347, *supra* note 8, § 3194(i); H.R. 2643, *supra* note 8, § 3194(i); H.R. 6046, *supra* note 5, § 3194(i); H.R. 5227, *supra* note 2, § 3194(i).

⁴⁰⁵H.R. 3347, *supra* note 8, § 3196(c)(1); H.R. 2643, *supra* note 8, § 3196(c)(1); H.R. 6046, *supra* note 5, § 3196(c)(1). However, it further requires that surrender be performed within thirty days from the court’s certification of its transcript if the relator has waived the extradition hearing. H.R. 3347, *supra* note 8, § 3196(c)(2); H.R. 2643, *supra* note 8, § 3196(c)(2); H.R. 6046, *supra* note 5, § 3196(c)(2). The original House bill, H.R. 5227, contained no limitation on the relator’s removal in either situation.

⁴⁰⁶H.R. 3347, *supra* note 8, §§ 3194(i), 3196(c); H.R. 2643, *supra* note 8, §§ 3194(i), 3196(c); H.R. 6046, *supra* note 5, §§ 3194(i), 3196(c); H.R. 5227, *supra* note 2, § 3194(i).

⁴⁰⁷*Id.*

⁴⁰⁸*Id.*

as it should be in this regard. Nevertheless, it is quite likely that in practice it will not necessarily create confusion or conflict with respect to the roles of the Secretary of State and the Attorney General.

XXI. TRANSIT EXTRADITION

A section regarding transit extradition is included in the House version⁴⁰⁹ but not in the Senate's.⁴¹⁰ It provides for cooperation between the United States and other governments in the transit extradition of persons going through United States territory. Such a provision is not present in existing legislation. The procedure applies to individuals who have been found extraditable in a country other than the United States and who are being delivered to a country other than the United States, but whose surrender requires passage or transit through the United States. During such transit the person in question would be in the custody of agents of a foreign government and therefore held in custody in the United States without judicial authority. During such transit that individual could file a petition for a writ of *habeas corpus* charging that his detention in the United States is without legal authority. In order to prevent the filing of such petitions, this provision seeks to create statutory authority for the Attorney General to hold a person in custody for not more than ten days until arrangements are made for the continuation of such person's transit. Though this provision had been recommended to the House and Senate by this writer,⁴¹¹ it was also recommended by this writer that the Attorney General obtain a court order based on some documentation and a request from the foreign government seeking permission for a transit, but that requirement was not included. The Act thus gives the Attorney General a right of detention without judicial process which on its face appears unconstitutional.⁴¹² In any event it could be challenged by means of petition for a writ of *habeas corpus*.

XXII. RECEIPT OF A PERSON FROM A FOREIGN STATE

The Senate and House versions of the Act contain virtually identical provisions for the receipt of a person from a foreign state.⁴¹³ The section in both bills provides for the authority of the Attorney General to appoint

⁴⁰⁹The House Bill provides

The United States may cooperate in the transit through the territory of the United States of a person in custody for extradition from one foreign state to another foreign state. The Attorney General may hold such person in custody for not more than ten days until arrangements are made for the continuation of such person's transit.

H.R. 3347, *supra* note 8, § 3197; H.R. 2643, *supra* note 8, § 3197; H.R. 6046, *supra* note 5, § 3197. There is no equivalent provision in H.R. 5227.

⁴¹⁰A recommendation that the new legislation contain a provision for transit extradition was made by this writer before the Senate and House Judiciary Committee Hearings on the proposed Act. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 23; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 106.

⁴¹¹See *supra* note 410.

⁴¹²At the least, the provision would violate the fourth amendment of the United States Constitution requiring probable cause for an arrest.

⁴¹³See S. 220, *supra* note 7, § 3197; S. 1940, *supra* note 5, § 3197; S. 1639, *supra* note 1, § 3197; H.R. 3347, *supra* note 8, § 3198; H.R. 2643, *supra* note 8, § 3198; H.R. 6046, *supra* note 5, § 3198; H.R. 5227, *supra* note 2, § 3197.

an agent to receive from a foreign government custody of a person accused of a federal, state, or local offense.⁴¹⁴ While it would appear that this provision relates to the receipt of a person held extraditable to the United States pursuant to a treaty of extradition and a formal process, it is not so specified.⁴¹⁵ Consequently, this provision may appear to simply allow the Attorney General to receive custody of any individual irrespective of whether this is accomplished within the framework of extradition. Presumably the courts in interpreting this provision will be controlled by the title of the Act and interpret it to be limited to receipt of custody of a person held extraditable to the United States.

In addition, the provision specifically authorizes receipt of a person accused of a federal, state, or local offense on the condition that such person shall be returned to the foreign state upon determination of the criminal proceedings held against him in the United States.⁴¹⁶ This procedure has long been advocated by this writer.⁴¹⁷ The purpose here is to allow a person who is in the custody of a foreign government to be brought back to the United States for trial and to be returned to the foreign government for his detention there without having to await his release from detention by that government before commencing criminal proceedings against him in the United States. This clearly will assist prosecutions in the United States which might otherwise become stale if the individual is permitted to await determination of his sentence in the foreign country before his return to the United States to face criminal charges.

Regrettably there is no reverse provision which permits the extradition of a person from the United States to a foreign government for the same purpose, though nothing precludes the conditional surrender of a person to a requesting state after an order of extraditability for purposes limited to his trial in that country and for his return thereafter to the United States for the execution of his sentence.

XXIII. DISSOLUTION OF AN EXTRADITION ORDER

Under the House bill, if after forty-five days from the date of receipt by the Secretary of State of the certified copy of the transcript of the proceedings, the government, in this case the Attorney General, takes no appeal or, if after forty-five days after the issuance of final order of the appellate court has been entered, the Secretary of State has not decided to surrender the relator, the relator can petition the court, with notice to the Secretary of State who informs

⁴¹⁴S. 220, *supra* note 7, § 3197(a); S. 1940, *supra* note 5, § 3197(a); S. 1639, *supra* note 1, § 3197(a); H.R. 3347, *supra* note 8, § 3198(a); H.R. 2643, *supra* note 8, § 3198(a); H.R. 6046, *supra* note 5, § 3198(a); H.R. 5227, *supra* note 2, § 3197(a). Under current practice, it is the Secretary of State rather than the Attorney General who has the authority to appoint agents. See 18 U.S.C. § 3192 (1976); Exec. Order No. 11517, 35 Fed. Reg. 4937 (1970), *reprinted in* 1970 U.S.C.A.N. 6232.

⁴¹⁵The Senate and House Judiciary Reports, in their commentaries on this section, refer to the process of extradition, but do not specifically limit the authority to such process. See Senate Judiciary Report on S. 1940, *supra* note 15, at 23-24; House Judiciary Report on H.R. 6046, *supra* note 23, at 33.

⁴¹⁶This procedure is now statutorily regulated at 18 U.S.C. §§ 4107-08 (1976).

⁴¹⁷See Bassiouni, *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 74 PROC. AM. SOC'Y INT'L L. 273 (1980).

the Attorney General (but no direct notice to the Attorney General), for dissolution of the extraditability order.⁴¹⁸ The Attorney General may then petition the court for an extension of time, presumably for good cause though the grounds are not defined, and the court is admonished not to grant further extensions of time without causation.⁴¹⁹ This provision resembles a speedy trial provision,⁴²⁰ but it is unclear whether it is mandatory or peremptory. While it appears reasonable for the United States to establish time limits and guidelines on the surrender of individuals to requesting states, it would seem also appropriate that such time limits be couched in more discretionary terms, particularly if they are so short in duration.

XXIV. RULES OF COURT AND COSTS

The House bill, but not the Senate, contains a provision regarding rules of the court.⁴²¹ This section provides, for the first time in the history of extradition legislation, for the Supreme Court of the United States to prescribe rules of practice and procedure with respect to any and all proceedings under this Act. Such rules of procedure and practice are not to take effect until presented to Congress by the Chief Justice of the Supreme Court or after the beginning of a regular session of Congress, but no later than the first day of May and until the expiration of 180 days after they have been thus reported. This legislative delegation of authority to the Supreme Court is to follow similar provisions concerning the Supreme Court's authority with respect to rules of practice and procedure in civil and criminal matters under the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure. It is therefore assumed that the delegation of authority being the same, its parameters are also to be the same.

This provision permits the Supreme Court to close the many legislative gaps in the Act discussed contextually above, and to clarify legislative ambiguities, thus avoiding protracted litigation and conflicting court decisions which would keep the early cases under the Act in litigation for a number of years and defeat its avowed purpose of streamlining and accelerating the process. Because of the *lacunae*s in the legislation as identified above, the rule-making power of the Supreme Court may truly become supplemental legislation. However, in view of the many areas of the law competing for the Supreme

⁴¹⁸See H.R. 3347, *supra* note 8, §§ 3194(i), 3196(C); H.R. 2643, *supra* note 8, §§ 3194(i), 3196(c); H.R. 6046, *supra* note 5, §§ 3194(c), 3196(c); H.R. 5227, *supra* note 2, § 3194(c).

⁴¹⁹*Id.*

⁴²⁰See *supra* notes 239-44 and accompanying text.

⁴²¹The bill states:

The Supreme Court of the United States shall prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings under this chapter. The Supreme Court may fix the dates when such rules shall take effect, except that such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been thus reported.

H.R. 3347, *supra* note 8, § 3199(f); H.R. 2643, *supra* note 8, § 3199(f); H.R. 6046, *supra* note 5, § 3199(f); H.R. 5227, *supra* note 2, § 3198(f).

Court's attention, it is not very likely that it will intervene before the problems relating to this Act increase in number and lag in time. Hopefully the Advisory Committee will have the benefit of experienced scholars and practitioners.

The Act also provides that transportation costs, presumably those of the relator and witnesses, subsistence expenses of the same and translation costs incurred by the United States government with respect to an extradition request shall be borne by the requesting government unless otherwise specified by the applicable treaty.⁴²² Nevertheless, the Secretary of State has the unreviewable discretion to direct otherwise, in which case costs may be borne by the United States.⁴²³

XXV. THE RULE OF NON-INQUIRY AND CONDITIONAL EXTRADITION

The Act provides that if the return of the relator to the requesting state is "incompatible with humanitarian considerations," the Secretary of State will have the discretion (unreviewable under the Administrative Procedure Act⁴²⁴), to determine whether the relator should be returned to the requesting state.⁴²⁵ It thus adds nothing new to existing law and practice, since the Secretary has executive discretion in any instance where extradition of a relator from the United States has been requested.⁴²⁶

United States courts have so far refused to inquire into the processes by which a requested state secures evidence of probable cause to request extradition, or the means by which a criminal conviction is obtained in a foreign state, or into the penal treatment to which a relator may be subjected upon extradition. Even *habeas corpus* is not a valid means of inquiry into the treatment the relator is anticipated to receive in the requesting state.⁴²⁷

The test of the rule of non-inquiry is applied in cases where the relator is likely to encounter such treatment in the requesting state that it is likely to

⁴²²S. 220, *supra* note 7, § 3198(b); S. 1940, *supra* note 5, § 3198(b); S. 1639, *supra* note 1, § 3198(b); H.R. 3347, *supra* note 8, § 3199(e); H.R. 2643, *supra* note 8, § 3199(e), H.R. 6046, *supra* note 5, § 3199(e); H.R. 5227, *supra* note 2, § 3198(e).

⁴²³*Id.*

⁴²⁴5 U.S.C. §§ 701 *et seq.* (1976).

⁴²⁵*See* S. 220, *supra* note 7, § 3196(a)(3)(B); S. 1940, *supra* note 5, § 3194(g)(2); S. 1639, *supra* note 1, § 3194(a); H.R. 2643, *supra* note 8, § 3194(e)(4)(B); H.R. 6046, *supra* note 5, § 3194(e)(3)(B); H.R. 5227, *supra* note 2, § 3194(e)(1)(B). H.R. 3347 also permits the court to deny extradition for this reason. *See supra* note 300. This section of the Act is discussed *supra* at notes 375-94 and accompanying text.

⁴²⁶*See generally* 2 M.C. BASSIOUNI, U.S. INTERNATIONAL EXTRADITION, *supra* note 12, at Chap. IX.

⁴²⁷*See* Neely v. Henkel, 180 U.S. 109. The rule of non-inquiry is brought into sharp focus in the line of cases dealing with convictions *in absentia*. In such cases, the United States follows the general practice in international law that convictions *in absentia* are not conclusive to the individual's guilt but are regarded as equivalent to indictments or formal charges against the individual sought to be extradited. A careful reading of the decisions applying the rule of non-inquiry in such cases reveals that while the courts prefer not to inquire into the treatment to be received by the relator upon surrender or the quality of justice he or she is expected to receive, there is nonetheless in some instances a finding of nonextraditability on "other grounds." *See Ex parte Fudera*, 162 F. 591 (S.D.N.Y. 1908), *appeal dismissed*, 219 U.S. 589 (1911); *Ex parte La Mantia*, 206 F. 330 (S.D.N.Y. 1913); *In re Mylones*, 187 F. Supp. 716 (N.D. Ala. 1960). *See also* Argento v. Horn, 241 F.2d 258.

be deemed significantly offensive to the minimum standards of justice, treatment of individuals and preservation of basic human rights, as perceived by the requested state. Thus, the surrender of a relator, whether a United States citizen or not, is unimpaired by the absence in the requesting state of those specific safeguards available in the United States legal system and therefore no judicial inquiry into the requesting state's legal system is permitted.⁴²⁸

There is, however, based on increasing *dicta* in the court opinions reason to believe that the rule of non-inquiry could be eroded given the appropriate case.⁴²⁹ This could arise in two types of cases: (1) where the evidence presented by a requested state is the product of a serious violation of due process (such as torture), the court could give no weight or even refuse to admit that evidence; and, (2) where there is evidence that the individual may be subject to cruel, inhuman or degrading treatment in the requesting state, the court could refuse to order the relator's extradition. Such a holding could easily rely on existing international instruments binding upon the United States. Among these international instruments are the Universal Declaration of Human Rights,⁴³⁰ the International Covenant on Civil and Political Rights,⁴³¹ the Inter-American Convention on Human Rights⁴³² and others.⁴³³

Finally, it should be noted that the 1967 Protocol on Refugees no longer permits a court to rely on the rule of non-inquiry to refuse inquiry into the possible persecution of the relator once returned to the requesting state.⁴³⁴

Thus, it would have been preferable for the Act to provide for limited judicial inquiry into the treatment or punishment to which a relator may be subjected upon return to the requesting state. Such an amendment is suggested for two reasons: (1) the provision should take into account that certain practices of corporal punishment or cruel, inhuman or degrading treatment or punishment are contrary to United States public policy as well as contrary to internationally protected norms of human rights; and (2) the provision should not specifically state that discretion is given to the Secretary of State, because

⁴²⁸Holmes v. Laird, 459 F.2d 1211; Gallina v. Fraser, 278 F.2d 77. A requesting state's internal procedures will only be examined when they are antithetical to the federal court's sense of decency. U.S. *ex rel.* Bloomfield v. Gengler, 507 F.2d 925.

⁴²⁹See Gallina v. Fraser, 278 F.2d at 78-79; Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), *cert. denied*, 446 U.S. 856 (1980), *reh'g denied*, 449 U.S. 1027 (1980); Escobedo v. United States, 621 F.2d 1098.

⁴³⁰G.A. Res. 217 A (III) U.N. Doc. A/810, at 71 (1948)..

⁴³¹G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316.

⁴³²O.A.S.T.S. No. 36 at 1, O.A.S. Off. OEA/Ser. L/V/II. 23, doc. 21, rev. 6 (english 1979).

⁴³³E.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222, E.T.S. No. 5; Draft Convention for the Prevention and Suppression of Torture, Feb. 1, 1978, U.N. Doc. E/CN.4/NGO 213, now under U.N. consideration. See also Bassiouni & Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 REV. INT'L DE DROIT PENAL 23 (1977). See also U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON FOREIGN AFFAIRS, HUMAN RIGHTS DOCUMENTS: COMPILATION OF DOCUMENTS PERTAINING TO HUMAN RIGHTS (comm. Print Sept. 1983).

⁴³⁴See *supra* notes 379-87 and accompanying text.

this could place the United States in a position of embarrassment *vis a vis* a foreign government and could burden relations between the United States and that government.

For example, the Act could contain the following proposed language:

Upon a *prima facie* showing by the requested person that he or she is likely to be subjected to cruel, inhuman or degrading treatment or punishment, extradition shall not be granted unless the requesting state shall present to the Secretary of State satisfactory assurances that such treatment or punishment shall not be imposed; or where a treaty between the United States and the requesting state for transfer of prisoners exists, that the extradition shall be conditional upon the return of the relator upon conviction for the execution of the sentence in the United States. The Secretary of State shall negotiate these conditions in accordance with section 3196 and their terms shall be presented to the court and made part of the order. Only in the most egregious cases shall the court deny extradition. The Secretary of State may in any event exercise his discretion after a finding of extraditability by the court.⁴³⁵

Like the political offense exception, this provision was hotly debated in the Senate and House, and the Administration took a strong position against giving the judiciary any discretion in the matter.

XXVI. THE PRINCIPLE OF SPECIALTY AND RE-EXTRADITION

The Act contains no specific provision embodying the principle of specialty, which is well established in United States jurisprudence.⁴³⁶ This principle stands for the proposition that the requesting state which secures the surrender of a person can prosecute that person only for the offense for which he or she was surrendered by the requested state, or else allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered. The same limitation exists on re-extradition from an originally requesting state to another state.⁴³⁷ These requirements are designed to insure the United States that its treaty relations and legal processes are not used for a purpose different

⁴³⁵These observations and suggestions were also made by this writer at congressional hearings in various versions of the Act. See *Senate Judiciary Hearings on S. 1639*, *supra* note 3, at 21; *House Judiciary Hearings on H.R. 5227*, *supra* note 4, at 100, 104-05; *House Foreign Affairs Hearings on H.R. 6046*, *supra* note 27.

⁴³⁶See *Treaty Between the United States and Mexico*, Jan. 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656, art. 17; *Treaty Between the United States and the Federal Republic of Germany*, Aug. 29, 1980, ____ U.S.T. ____, T.I.A.S. No. 9785, art. 32. See also *Cosgrove v. Winney*, 174 U.S. 64 (1899); *Johnson v. Brown*, 205 U.S. 309 (1907); *Greene v. United States*, 154 F. 401 (5th Cir. 1907); *Collins v. O'Neil*, 214 U.S. 113 (1909); *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962); *Fiocconi v. United States*, 462 F.2d 475 (2d Cir. 1972), *cert. denied*, 409 U.S. 1059 (1972); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir. 1973), *cert. dismissed*, 414 U.S. 884 (1973); *McGann v. U.S. Board of Parole*, 488 F.2d 39 (3rd Cir. 1973), *cert. denied*, 416 U.S. 958 (1974), *reh'g denied*, 417 U.S. 927 (1974); *United States v. Rossi*, 545 F.2d 814 (2d Cir. 1977), *cert. denied*, 430 U.S. 907 (1977); *United States v. Flores*, 538 F.2d 939 (2d Cir. 1976); *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977); *Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979).

⁴³⁷See generally 1 M.C. BASSIOUNI, *U.S. INTERNATIONAL EXTRADITION*, *supra* note 12, at ch. VII, § 6.

than the one which is specified in the applicable treaty.

The Act implicitly considers the applicability of the principle of specialty only in its section regarding the relator's waiver of the extradition hearing,⁴³⁸ but does not provide for the rule's applicability to other aspects of the extradition process. Although it can be presumed that this lack of clear legislative guideline does not affect jurisprudential precedent recognizing this principle, it would have been preferable to include in the Act a specific provision embodying it.

While the rule is ostensibly intended to benefit the extraditing state, as is reflected in the proposed texts of the Act, it is also intended to protect the relator by preventing prosecution on the basis of physical presence without a showing of probable cause to the satisfaction of the requested state (in this case, the United States). The principle must also be interpreted in light of conditional extradition and re-extradition. The former applies in the case where the United States would only conditionally extradite a person for a specific crime.⁴³⁹ The latter limits re-extradition to a third state without specific authorization from the originally requested state (in this case, the United States), without a showing of probable cause.

A proposed text is as follows:

A returned person shall not be prosecuted, punished or re-extradited while under prosecution or punishment in the requesting state without the specific approval of the Secretary of State who may at his discretion authorize any variance in prosecution or punishment in the requesting state or re-extradition upon a showing of probable cause.⁴⁴⁰

XXVII. CONCLUSION

The analysis made hereinabove shows the differences between the Senate and House versions, and the differences with or conformity to existing legislation and existing jurisprudence. The House version goes beyond the Senate's in closing certain gaps, but even so, it is hoped that when the House considers the present bill or a revised version thereof that it takes into consideration some of the observations made herein, and certainly others that interested commentators may point out. This is a unique historic opportunity to enact new legisla-

⁴³⁸See S. 220, *supra* note 7, § 3193; S. 1940, *supra* note 5, § 3193; S. 1639, *supra* note 1, § 3193; H.R. 3347, *supra* note 8, § 3193; H.R. 2643, *supra* note 8, § 3193; H.R. 6046, *supra* note 5, § 3193; H.R. 5227, *supra* note 2, § 3193. See also House Judiciary Report on H.R. 6046, *supra* note 23, at 12. The section regarding waiver is discussed *supra* at notes 187-212.

⁴³⁹The Act provides for conditional extradition as part of the Secretary of State's executive discretion. See S. 220, *supra* note 7, § 3196(a)(3)(B); S. 1940, *supra* note 5, § 3194(g)(2); S. 1639, *supra* note 1, § 3194(a); H.R. 3347, *supra* note 8, § 3196(b); H.R. 2643, *supra* note 8, § 3196(b); H.R. 6046, *supra* note 5, § 3196(b); H.R. 5227, *supra* note 2, § 3196(b). It is discussed *supra* at notes 338-90 and accompanying text, and also discussed with respect to the rule of non-inquiry *supra* at notes 424-35 and accompanying text.

⁴⁴⁰These suggestions were made by this writer at congressional hearings on various versions of the Act. See Senate Judiciary Hearings on S. 1639, *supra* note 24, at 20; House Judiciary Hearings on H.R. 5227, *supra* note 4, at 103; House Foreign Affairs Hearings on H.R. 6046, *supra* note 27.

tion that will provide for more effective and swift extradition proceedings without unduly sacrificing fundamental human rights embodied in international standards and in United States constitutional law and policy as interpreted and applied in criminal cases.

No extradition bill is expected to pass in this legislature because of differing positions on the political offense exception, the rule of non-inquiry and the bail provisions. The lines are drawn between the Administration and its supporters, principally in the Senate, and those deemed "liberal" in the House. The differences are technically not so wide, but the feelings run strong among different protagonists of different views. Regrettably a needed reform cannot pass because of opposing ideological positions, and the introduction in a technical area, of a variety of political considerations which are of very limited significance to the overwhelming majority of cases. Only bail is an issue that affects most, if not all, extradition cases. The political offense exception has been granted only three times in the past thirty years.⁴⁴¹ The rule of non-inquiry has, in fact, always been upheld in the United States.

⁴⁴¹See McMullen note 46, Mackin, *supra* note 45, and the latest case, in the matter of William Joseph Quinn, C 82-6688 R.P.A. (N.D. Cal.) opinion of Robert P. Aguillar, Oct. 3, 1983, holding the "political offense exception" to apply. Pending before the Ninth Circuit, docket No. 83-2455.